No. 599

United States Supreme Court

United States of America,
Appellant

vs.

Chandler-Dunbar Water Power Company,
Appellee

Appeal from the United States Circuit Court of Appeals, Sixth Circuit, Reviewing the Judgment of the Circuit Court of the United States for the Western District of Michigan, Northern Division.

OCTOBER TERM, 1907.

BRIEF OF APPELLEE.

NATURE OF CASE.

Bill to quiet title to islands one and two in the water communication between Lakes Huron and Superior, called by the appellant "St. Mary's Strait" and by appellee "St. Mary's River."

ISSUES.

THE COMPLAINT states that

The United States "is the owner of islands number one and two in the Straits of St. Mary within * * * the north half of section six, township forty-seven north, range one east, (Rec. 1), title coming from Great Britain to the United States through state of Virginia (Rec. 1 to 6.)

By the Treaty of Washington, it was agreed that "all the water communications along the line so established 'shall be free and open to the citizens and subjects of both countries.'" (Rec. 4.)

It is not competent to the state of Michigan to pass title to the subaqueous lands under the Strait of St. Mary, to the riparian owner, on account that such strait is international water, and that such transfer of title would complicate the United States in its treaty relations with Great Britain.

United States made patent to Wm. Chandler, grantor of defendant, of the south shore of St. Mary's Strait, adjacent to islands one and two, on December 15, 1883, under which patent defendant claims title to islands one and two.

Such patent was issued by mistake. (Rec. 15.)

Such patent was void, because

FIRST. Of land within executive reservations of April 3, 1847 (Rec. 8), and of September 2, 1847 (Rec. 8), and reservations of War Department, March 10, 1852, and August 5, 1852 (Rec. 16).

SECOND. Of land not surveyed. (Rec. 15.)

THIRD. Patentee then superintendent, under the War Department, of the St. Mary's Canal. (Rec. 14.)

FOURTH. Based on location of Porterfield Scrip on land then within the limits of a corporate village. (Rec. 14.)

Complainant has title by adverse possession and statute of limitations of state of Michigan.

Value of islands exceeds $50,000.

Defendant's claim thereto "threatens to be a source of embarrassment in its international relations with Great Britain."

WRITING CLOSE TO E

ISSUES

THE ANSWER:

Denies title of the United States to the islands. Alleges title in the defendant through the Chandler patent. (Rec. 20.)

Alleges that it was not agreed "by said treaty of Washington that the waters of the river St. Mary 'shall be free and open to the citizens and subjects of both countries.'" (Rec. 22.)

Alleges that it was competent to the State of Michigan to pass title to the subaqueous lands under the river of St. Mary to the riparian owner, and that the defendant's ownership of said islands "is not in any way inconsistent with, or in derogation of, the international and sovereign obligations of the complainant to or with Great Britain, and has no relation thereto, and does not threaten to become a source of embarrassment to the United States." (Rec. 27.)

Denies that the patent was issued by mistake. (Rec. 23.)

Denies that the executive reservations of April 4, 1847, September 2, 1847, and the designation of the War Department of March 10, 1852, and August 3, 1852, operated as a reservation of the lands patented to Chandler on account that the same were, during all that time, subject to the Indian right of occupancy under treaty June 16, 1820. (Rec. 22-3.)

Alleges that the lands in controversy were released from the executive reservations (if ever under reservation) by act of Congress September 25, 1850 (9 Stat. 459), and by action of the War Department and the Department of the Interior under the same; and by act of Congress August 26, 1852 (10 Stat. 25), called the Canal Act, and the location of the canal grant, and executive order of release December 9, 1852 (Rec. 22-3).

Alleges that the land was surveyed under the regular United States survey in 1845, and again under a special survey by Thomas Whelpley under act of Congress, approved September 26, 1850 (9 Stat. 469). (Rec. 28-9.)

Denies that the patentee, Chandler, held any Federal office at the time of location. (Rec. 25.)

Denies adverse possession of the United States, and alleges possession in the defendant and its grantor from the date of the patent to the 23rd day of March, 1903. (Rec. 27.)

Alleges the islands "are of no value to the United States or to any person or corporation other than this defendant

Their value to this defendant is on account of their relation to the water power developed, and to be developed, on complainant's adjacent riparian lands." (Rec. 32.)

Alleges that islands have no relation to, or bearing upon, or value in connection with, the improvement of the navigation of the St. Mary's River (Rec. 32); and no relation to the international relations of the United States with Great Britain. (Rec. 32-3.)

Alleges that the water in which they lie is a river, not a strait. (Rec. 28.)

Alleges that they were left unsurveyed because insignificant and, for the purposes of the United States, valueless, and worth only a small fraction of the necessary expense of surveying them. (Rec. 28-9.)

Description of the St. Mary's river at the point in controversy. (Rec. 30.)

Description of the islands and their location. (Rec. 31.)

Alleges that complainant is estopped from attacking defendant's title to the upland because of

The adjudication on Chandler's application; the lapse of time since the patent was issued; the retention of the Porterfield scrip by the United States; defendant's *bona fide* purchase for value from the patentee; payment of taxes and large expenditures upon the upland and complainant's dealing with defendant as the owner of the lands. (Rec. 31-2.)

Alleges that the "object of this action * * is not to further or protect any interest of the United States," nor to protect "its property, nor to vindicate itself, nor in order to enable it to do justice * * or to fulfill its obligations * *. On the contrary, the object * * is to aid the Michigan-Lake Superior Power Company in an attempt to divert" from defendant's riparian lands "the waters of the St. Mary's River, for which diversion an act of Congress, approved June 13, 1902, is claimed as authority." (Rec. 33.)

Pleads U. S. Statute of Limitations (Rec. 36-7).

On the trial the complainant abandoned its claim, under the statute of limitations.

Defendant limited its claim that the suit was not in behalf of the United States to the point that the attack upon the Chandler patent to the uplands was not in behalf of the United States.

LEGAL POINTS

I.

SHOULD THE ATTACK ON THE PATENT involved in point II., **BE DISREGARDED** on account that same is **not by authority of the United States,** but in the interest of the Michigan-Lake Superior Power Co.?

II.

IS PATENT United States to Wm. Chandler of the main land, over against which the islands lie, **VOID** because, as is claimed by the United States,

FIRST: Said land was **under reservation** when located?

SECOND: Said land was **never legally surveyed?**

THIRD: Land was **in incorporated village** when located?

III.

IS UNITED STATES ESTOPPED to claim invalidity of this patent, because of,

FIRST: The **decision of the Secretary of the Interior** relative to the issue of the same, and acquiescence of the United States therein, and the improvements made on the land under the patent, and retention of Scrip?

SECOND: **Statute of limitations?**

IV.

DID TITLE TO ISLANDS one and two pass to William Chandler, riparian, **by patent of the mainland?**

This is the only point which should be in the case, as it seems to us. But the attack upon the patent has been injected into it. Hence we discuss its validity.

ARGUMENT

I.

ATTACK ON PATENT UNAUTHORIZED.

We here quote statement of facts from Judge Severens' opinion:

"In order to understand the grounds on which the decree was rested and also for the purpose of disposing of an objection raised here by the appellee and based on one of the grounds taken by the court below, it is necessary to make a preliminary statement of some special facts There is a fall in the St. Mary's River along the front of the Chandler tract of about nine feet, the benefit of which the defendant wished to preserve. The Michigan, Lake Superior Power Company was proposing to divert the water of the river at a point above the Chandler tract, but on the same shore, and carry it behind that tract for the purpose of using it for power. Sharp controversy on this subject was pending between those parties when on November 26, 1901, one of the attorneys employed by the Michigan, Lake Superior Power Co. made application to locate some scrip on these islands and a narrow strip of land along the adjacent margin of the river. (Rec. 561-564-568-9-0). This strip would separate the land described in the Chandler patent from the bed of the stream. In March ,1902, the defendant brought suit by bill in equity against the Michigan, Lake Superior Power Co. in the State Circuit Court to restrain the threatened diversion of the water. (Rec. 577-582.) The defendant in that suit answered, admitting the title to the mainland under the Chandler patent, but alleging that the title to the bed of the river was in the State. (Rec. 583, 635.) Shortly thereafter, the Michigan, Lake Superior Power Co. employed an attorney at Washington to promote the application of the before mentioned attorney to locate the islands and the marginal strip by virtue of the scrip as aforesaid. This was in December, 1902. (Rec. 663.) In January following the Secretary of the Interior requested the Attorney General to bring a proper action to obtain a judicial determination whether unsurveyed islands in the connecting waters of the Great Lakes passed by grants of the riparian tracts. (Rec. 743.) In February following, the Washington attorney of the Michigan, Lake Superior Power Co. was employed as special

assistant to the United States Attorney at a nominal consideration to be thereafter determined by the Attorney General. (Rec. 665.) In April following, a bill was filed by the District Attorney in behalf of the United States against the defendant in the court below to settle the question which the Secretary of the Interior had proposed. It assumed the validity of the Chandler patent, but complained that the defendant asserted title thereunder to the islands. This bill was subsequently withdrawn. (Rec. 658-663.) On September 2, 1903, the present bill was filed bearing the signature of the United States Attorneys and of the special assistant employed in behalf of the United States as before stated. (Rec. 1-18.) On the following day the Michigan, Lake Superior Co. moved in the State Court for leave to withdraw the admission it had made in its answer of title to the mainland in the complainant, (the defendant here) on an affidavit that from investigations at Washington made by its counsel, it had learned that the complainant (in that suit) had no title therein. (Rec. 635, 657.) The learned Judge in the court below, the late Judge Wanty, after referring in his opinion to the presence of the representative of a private party in the promotion of the suit, refused to consider the validity of the Chandler patent, saying:

'The patent to the shore or upland, issued December 15, 1883, to the defendant's grantor, is attacked in the bill for the purpose of defeating any claim of the defendants to these islands, but those allegations will not be considered by the court, as they raise no questions which the United States has any interest in having determined in this suit. If in this case it should be held that the patent to the upland is invalid, then the title to these islands for that reason would be in the United States, and the only question for the determination of which this suit was authorized would be entirely eliminated, as any expression of opinion as to what the status of these islands would have been if the patent had been valid instead of invalid would be obiter dictum. The complainant does not here ask to have this patent set aside, and if it seriously questioned its validity for any reason set up in the bill of complaint its officers would undoubtedly take steps to annul the patent and resume title and possession, of the valuable land on the shore as well as to these insignificant islands, whose only value to the complainant, if it does not own the upland, seems to lie in

their position to form the subject matter of a cause for the determination of the question for the adjudication of which this suit was authorized to be instituted in the name of the United States.'" (Rec. 45-6.) (152 Fed. Rep. 27-8.)

We claim that the facts recited show that the attack upon the Chandler Patent is not made by authority of, or for the benefit of, the United States, but of the M. L. S. P. Co. by its attorney, Mr. Fox, in its employ. The United States permits the M. L. S. P. Co. to speak in its name. Truly, "The voice is Jacob's voice; but the hands are the hands of Esau."

The Secretary of the Interior wished to know, for benefit of General Land Office, if title to unsurveyed islands "in St. Mary's river or strait" passed by patent of the adjacent mainland under the rule in Railroad vs. Butler. By his letter of January 21, 1903, (Rec. 255) he requested the Department of Justice to cause suit to be instituted to determine that question. That letter is produced by complainant's counsel as justification for the conduct of this suit by special counsel, Mr. Fox. Mr. Fox's special fitness to present the question fully justifies his employment as special counsel herein, so far as he conducts the contention in the interest of the United States.

But, unquestionably, the facts recited, show that his employment was nominally by, and in the interest of, the United States, but really by, and in the interest of, the M. L. S. P. Co. Unquestionably the attack upon the Chandler patent is in the interest of the M. L. S. P. Co. and not the United States. Such attack, if successful, prevents any decision of the question,—Does the patent of the adjacent mainland carry title to the islands?—which is the sole object for which the Secretary of the Interior asked that the action be commenced.

This view is strengthened by contents of letters Secretary of the Interior to the Commissioner of the General Land Office, January 21, 1903. (Rec. 742-3.) Commissioner of the General Land Office to Mr. Shine, November 1, 1904. (Rec. 743.) And Mr. Caldwell's transcript of Judge Van Devanter's statement. (Rec. 695-6.)

These and other documents show that, on making request that Department of Justice institute this action, the Department of the Interior suspended action in "All cases involving unsurveyed islands situate in waters connecting the Great Lakes * * pending the determination of the title of such islands

by the courts." (Rec. 743.) For all that appears, that class of cases is still suspended to await such adjudication.

The point could not well be made plainer than by Judge Van Devanter, when he said to Mr. Caldwell:

"The purpose of this department in suggesting the suit is not merely to determine the question of private interest in which Mr. Fox is interested, and to enable some of his clients to obtain title to one of these islands as public land, but it is rather to establish the public ownership of these islands."

By "these islands," Judge Van Devanter did not mean the specific islands involved herein, but islands of the same class. He says, "and thereby to protect and preserve the enormous expenditures and works which have been constructed upon some of them." (Rec. 696.) No expenditures have been made upon either of the islands in controversy. They are of no substantial value and of no value for use in aid of navigation.

Mr. Fox's letters of March 24, 1904, (Rec. 689-692) and July 14, 1904, (Rec. 692-698) to the Attorney General, are very full upon the point to secure adjudication on which the Interior Department was anxious, but do not mention this feature of the case, or call the Attorney General's attention to any approval by him, or any of his assistants, of any attack on the Chandler patent. Mr. Fox's letters refer to the letter Secretary of the Interior to the Department of Justice, as stating the public interest to be subserved by the action, saying,

"It is to the interest of the government that it should be adjudged that title to such islands does not pass from the United States by grant of the shore lands."

The Chandler-Dunbar Water Power Company, in its action against the M. L. S. P. Company, seeks to prevent the M. L. S. P. Company from diverting the waters of the St. Mary's river from its land on the south bank of the river. This action will not be defeated by defeating the Chandler-Dunbar Water Power Company's claim of title to the islands. But it will be defeated by defeating the Chandler-Dunbar Water Power Company's title to its mainland. If it owns the mainland it has a riparian right to restrain the diversion of the water from its riparian land above island No. 1, whereon is a fall of four feet. (Rec. 264.) This right to restrain diversion, and use the water for power, is one which attaches, not only to the subaqueous

lands, but to the riparian lands. It is a riparian, or bank, right,—a right not dependent upon the riparian ownership of the subaqueous lands. (1).

Gould says,

"Riparian rights proper depend upon the ownership of land contiguous to water, and are the same whether the proprietor of such land owns the soil under water or not."

He further says, quoting from Lord Selbourne in the Fishmongers case,

"It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good **jure naturae** as vertical."

Hence the interest of the M. L. S. P. Co. in the attack upon the Chandler Patent to the mainland, and the reason of the amendment to its answer in the diversion case, and the concurrent filing of the second bill (this bill) United States vs. Chandler-Dunbar Water Power Company attacking patent.

A review of the documents and letters and testimony relative to the conduct of this case shows plainly that the attack upon the Chandler patent is injected into the case by Mr. Fox, not in the interest of the United States, but in the interest of his client, the M. L. S. P. Co. Mr. Fox says in his letter of March 24, 1904, (Rec. 689.)

"None of my other clients, however, have any claim to, or interest in ,the islands which are the subject matter of this suit." (Rec. 691.)

NOTE 1—Morrill vs. Water Power Co., 26 Minn., 222, (1879);
Minneapolis vs. Milling Co., 26 Minn., 229, 232, (1879);
Gould on Waters, 3rd Edition, Sec. 148 and cases cited.
Wisconsin River Impt. Co. vs. Lyons, 30 Wis., 61, (1872);
Boom Co. vs. Reilly, 44 Wis., 295, 304 (1878);
Diedrich vs. R. R. Co., 42 Wis., 248, 262, (1877);
Lyons vs. Fishmongers, 1 Appeal Cases, 662, (1876);
Same case, 10 Chan. 679, (1875);

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He also says in his letter of July 14, 1904, (Rec. 695.)

"My client in that case" (the diversion case) "also makes no claim to the subject matter of the present suit, but it is evident that it is greatly interested in the result thereof, inasmuch as its defense in the Michigan Courts is identical with the position taken by the United States in the Federal Courts. By reason of this identity of interest in the legal principle involved, I was, and am, willing to co-operate in the suit of the United States against the Chandler-Dunbar Water Power Company for the nominal compensation stated in my appointment."

Ch-D. W. P. Co.'s title to mainland is conceded in first answer of M. L. S. P. Co. to complaint of Ch-D. W. P. Co. (Rec. p. 583) and in first bill United States vs. Ch-D. W. P. Co. (Rec. 659-660). Such title is denied in amended answer of M. L. S. P. Co. (Rec. 636-641) and in the bill herein (Rec. 14-5-6). The affidavit for leave to amend answer was made Sept. 2, 1903 (Rec. 640). Bill herein was verified Sept. 2, 1903 (Rec. 18). Same guiding hand.

Mr. Fox's client is especially interested in the attack on the Chandler patent, which attack is the foundation of its defense in the diversion case. On trial there was nothing to show that the United States wished to make any such attack. An attempt is made to show that the Attorney General authorized such attack by the testimony of a clerk in the Department of Justice, Mr. Caldwell. But the attempt fails. It appears from his testimony that the original bill, filed and recalled by Mr. Covell, was immediately sent to Mr. Fox when it was withdrawn, and that the new bill was drawn by Mr. Fox while Mr. Caldwell was away from Washington. (Rec. 701-2.)

Mr. Fox states that "My client in that case makes no claim to the subject matter of the present suit." This evidently refers to islands one and two. As to that matter, we call attention to the application of Mr. Fox's client's attorney, Mr. Wm. B. Cady, to enter with Porterfield Scrip islands one and two, and a narrow strip of shore land represented by him to lie between the Whelpley meander and the Mullet meander, or the actual shore-line (See O'Hare's tracing and Cady's application.) Evidently Mr. Fox's client, the M. L. S. P. Co., plans to have the first claim on islands one and two, if they can be wrested from the Chandler-Dunbar Water Power Company.

It is noticeable that the stream theretofore universally called St. Mary's River by the United States and by the M. L. S. P. Co., is called a strait simultaneously in M. L. S. P. Co.'s answer to complaint of defendant herein for diversion (Rec. p. 583), and in letter Secretary of Interior to Department of Justice, January 21, 1903 (Rec. p. 255), and in complaint in first action United States vs. Ch-D. W. P. Co. (Rec. p. 659), and in complaint herein (Rec. p. 71). Here is evidence of the same guiding hand in all these documents. Further respecting this change in name, see this brief "RIVER OR STRAIT."

Mr. Fox's employment is contrary to the Act of Congress, May 1, 1884. (23 Stat. 17;) Comp. Stat., Sec. 3679, "Hereafter no department or officer of the United States shall accept voluntary service for the government."

This statute is only declaratory of the law as it had been previously settled by the decisions of the United States Supreme Court. (2).

The M. L. S. P. Co. is not entitled to equitable consideration. It is in position of one watching to take advantage of the mistakes of others: first, by attempted Cady location; second, by the attack on the Chandler patent. Of such, Chief Justice Marshall says,

"He either did not mean to acquire the land within Taylor's entry, or he is to be considered as a man watching for the accidental mistakes of others, and preparing to take advantage of them. What is gained at law by a person of this description, equity will not take from him; but it does not follow that equity will aid his views, and give more than the law gives him." (Taylor vs. Brown, at 235.)

In United States vs. San Jacinto Tin Co., Mr. Justice Field says,

"Not for the interest of the United States, not for the protection of their property, or to vindicate their honor, but at the request of a private litigant, the name and power of the United States are invoked by the Attorney General to set aside a patent issued after a protracted contest upon the survey with the predecessor of this litigant."

NOTE 2—U. S. vs. San Jacinto Tin Co., 125 U. S., 273 (1888);
U. S. vs. Throckmorton, 98 U. S., 61 (1878);
Taylor vs. Brown, 9 U. S., 234 (1809).

"If this were a solitary instance where the name and power of the United States have been used to serve the interests of private parties, it might be passed by with the simple statement of facts. But, unfortunately, it is not a solitary instance. The records of this court show that it has been a frequent practice of the Department of Justice in authorizing suits for the cancellation of patents." (303.)

"I cannot admit that the Attorney General can, at the request of private parties, rightfully allow the use of the name and power of the United States in proceedings for the annulment of patents, upon such parties executing a bond as security for costs, or upon any other stipulation of indemnity to them. * * * * * The principle condemned is the same, whether the party rendering the service does so without any charge, or because paid by other parties. * * * * *

It is not to be supposed that any head of the Department of Justice has or would intentionally lend the name and power of the government to further private ends, and yet there is no practical difference between that course of procedure and the one adopted in this case." (305.)

"Whenever Congress has felt it important that patents for lands should be revoked, either because of fraud in their issue, or of breach in conditions in them, it has not failed to authorize legal proceedings for that purpose. In a multitude of cases titles to lands, upon which whole communities live, rest upon patents of the United States. In several instances, cities having more than a hundred thousand people residing within their limits are built on land patented by the government. I cannot believe that it is within the power of the Attorney General, to be exercised at any time in the future, this generation or the next—as no statute of limitations runs against the government—to institute suits to unsettle the title founded upon such patents, even where there are allegations of fraud in obtaining them. There must be a time when such allegations will not be heeded." (306.)

In United States vs. Throckmorton, Mr. Justice Miller says,

"It would be a very dangerous doctrine, one threatening the title to millions of acres of land held by patent from the government, if any man who has a grudge or a claim against his neighbor can, by indemnifying the government for costs,

and furnishing the needed stimulus to a district attorney, institute a suit in chancery in the name of the United States to declare the patent void. It is essential, therefore, to such a suit, that without special regard to form, but in some way which the court can recognize, it should appear that the Attorney General has brought it himself, or given such order for its institution as will make him officially responsible for it, and show his control of the cause." (71.)

After entry of judgment dismissing bill, Mr. Fox sought, on **motion for rehearing**, to brace up the claim that the United States wished to attack the Chandler patent. To that end, there were written letter of July 28, 1905, Acting Attorney General Hoyt to Secretary of Interior, and reply of Acting Secretary of Interior to Attorney General of August 4, 1905. (Rec. 53-4-5-6). Armed with these, he attacked Judge Wanty's decision. To this, Judge Wanty replied,

"Now this showing * * * does not relieve the situation from the large facts that are in it."

"Now what was said at the bar, and what is filed in Court, does not change my mind about it." (Rec. 67.)

It seems singular that these letters between the Department of Justice and of the Interior, upon so important a matter, and with the serious purpose of securing a rehearing in this case, should not carry with them the weight of the heads of the departments, but should have been by the Acting Attorney General and the Acting Secretary of the Interior. (Rec. 55-6.)

The object of suit is plainly stated by the Secretary of the Interior in his letter of January 21, 1903, to the Department of Justice (Rec. 255-6-7). It would seem that any **ex post facto** letter intended to show that the Interior Department had changed its view respecting the desirability of securing adjudication of the question should have the sanction of the Secretary rather than the Acting Secretary. We have no evidence that the Secretary has changed his views. Indeed, the absence of any letter from him is potent proof that his department still desires the adjudication asked for. There is no reason for, nor evidence of, change of policy in the Interior Department. We do not assume to improve upon Judge Wanty's statement of the reasons for disregarding the attack upon the patent, and for refusing a rehearing. (His decision Rec. 45 to 49. His opinion overruling motion for rehearing Rec. 66-7-8.)

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On trial Judge Wanty found the fact according to Respondent's contention.

On this point the Circuit Court of Appeals said, by Judge Severens: "We think, however, that the question of the propriety of employing an attorney for a private party to assist in the prosecution of a suit by the United States in the public interest is one addressed to the judgment and discretion of the Attorney General, who is charged with the responsibility for the conduct of the suit. If the object of the private party and that of the United States are one and the same, there would seem to be no sound objection. If, however, the name and authority of the United States were likely to be perverted to the promotion of a merely private object, one in which the public has no interest, such facts would indicate the impropriety of such a course, and might in some circumstances rightly influence the judgment in the case. For the reason that in the present case we find no ground for entertaining this objection as a foundation for judicial action in the disposition of the case upon its merits, we overrule it. But of course there will remain to us the duty of considering and determining what results ought to follow from the particular facts exhibited by the record and from the manner and occasion in which those facts are presented to the court for judgment." (152 Fed. Rep. 28.)

"We are much impressed by the contention of the appellee that the Court below was right in holding, as it did, that upon this bill, the question of the validity of the Chandler patent is not a legitimate subject of inquiry. It is not a direct attack. There is no prayer that the patent be declared void. Nevertheless such a decree as is asked in favor of the complainant, if it were rested upon the ground of the invalidity of the patent, would, as we suppose, operate as an estoppel in favor of the United States and of any grantee to whom it might convey." (152 Fed. Rep. 30.)

We still urge that "the validity of the Chandler patent is not a legitimate subject of inquiry" herein.

II.

PATENT TO MAINLAND IS VALID.

NOT UNDER RESERVATION.

Claim is made that the **patent** of the main land adjacent to Islands one and two, is **void**, because, as is alleged,

FIRST: Said land was **under reservation** when located.

Was the main land under reservation when located?

NO AUTHORITY TO RESERVE.

Presumably all orders of reservation relied on rest upon the last clause of Sec. 2, Act March 1, 1847 (9 Stat. 146), which says: "All the lands * * shall be sold * * excepting and reserving from such sales * * such reservations as the President shall deem necessary for public uses."

The act of 1847 did not authorize reservation from sale of the Indian Reserve.

This Reserve was provided for by treaty, which was a law under the constitution. (Const. Art. VI.)

The treaty provides,

"Art. 3. The United States will secure to the Indians * * * a place of encampment upon the tract hereby ceded, convenient to the fishing ground, which place shall not interfere with the defences of any military work which may be erected, nor with any private rights." (7 Stat. 206.)

Its boundaries were surveyed in 1845, (Rec. 121-2), and it is shown in the plat of survey.

Thus it is seen that the tract, Indian Reserve, had been by law appropriated and set aside for the use of the Indians two years before the act of March 1, 1847, (9 Stat. 146), was passed.

Shortly after the act of March 1, 1847, was passed, the President received from the Secretary of the Treasury a diagram upon which, colored green, was the N. fr. ½ of Tp. 47 N., R. 1 E., which he desired reserved "until the requisite investigation can be had." (Rec. 137-8.) (Diagram Blue Prints, Compts. Ex. 11.)

Thereupon President Polk, on April 3, 1847, made the order of reservation:

"Let the lands designated in the accompanying letter of the Commissioner of the General Land Office be reserved from sale as recommended by him." (Rec. 138.)

That this order of the President was based on the act of March 1, 1847, is seen in the letter of the Commissioner of the General Land Office, August 27, 1847, to the Secretary of the Treasury, wherein he said: "Fractional Sections 4, 5 and 6, Township 47 North, Range 1 E., were reserved for public uses under the act of 1st March, 1847, with other lands, by order of the President, of April 3, 1847." (Compts. Ex. B or Ex. 12, Rec. 139.)

The Executive reservation of September 2, 1847, was also based on the law of March 1. The Commissioner of the General Land Office, on August 27, 1847, in the letter just cited, asks that an "application be made to the President for the reservation of fractional sections 1 and 2, Township 47 North, Range 1 West, under the same act, for the use of Fort Brady."

The Secretary of the Treasury, August 30, 1847, requested the President to reserve "under act of 1st of March, 1847," the lands last above described.

The reservation of President Polk of September 2, 1847, of lands in fractional sections 1 and 2, Tp. 47 N., R. 1 W., and sections 4, 5 and 6, of Tp. 47 N., R. 1 E., was,

"Let the public lands described in this communication and in the accompanying one from the Commissioner of Public Lands be reserved from sale for the use of Fort Brady." (Compts. Ex. B., Rec. 139.)

The act of March 1, 1847, upon which these Executive orders in 1847 were based, did not authorize the President to reserve lands which were not public lands and subject to sale. Section 2 provided that a survey of the mineral lands should be reported, and as to non-mineral lands the law provided,

"And all the lands embraced in said district, not reported as aforesaid, shall be sold in the same manner as other lands under the laws now in force for the sale of the public lands, excepting and reserving from such sales * * * such reservations as the President shall deem necessary for public uses."

The Indian Reserve, however, having ceased to be public lands when the act was passed, having been set apart and ap-

propriated by law as a reserve, could not be included in the sales, and therefore would not come within the exception, and no authority was therefore given to the President to reserve it from sale. (3). It cannot be said that because the Indian Reserve was not mineral lands, and was not in section 16, that the act of March 1st authorized its sale unless reserved by the President, for the reason that the act did not embrace, include or operate upon the Indian Reserve.

Wilcox vs. Jackson was ejectment by defendant in error.

In 1824, the Secretary of War requested the Commissioner of the General Land Office to direct a reservation to be made for the use of the Indian department at that post; and in October, 1824, the Commissioner colored and marked upon the map the section as reserved for military purposes, and directed it to be reserved from sale for those purposes. In 1835 one Beaubean made claim for pre-emption of the land in question at Chicago; his claim was allowed, and he paid the purchase money and procured the register's certificate thereof.

Beaubean sold and conveyed his interest to plaintiff's lessor.

It was argued that by the fourth section of the act of June 26, 1834, the President was authorized to cause to be sold all the lands in the northeast district of Illinois, embracing the land in question, with certain reservations only, in which, it was contended, the land in question was not included; that a proclamation was issued directing various lands in said district to be sold, among which was the land in question, unless excepted by the words: "The lands reserved by law for the use of schools and for other purposes will be excluded from the sale;" and that an extended plat was forwarded from the General Land Office marking and coloring certain lands to be reserved from sale, but that the land in question was not so marked or colored to be reserved from sale. The court held

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NOTE 3—Wilcox vs. Jackson, 38 U. S., 496, (1839);
United States vs. Paine, 2 McCrary, 289.
Missouri Ry. vs. Roberts, 152 U. S. 114, (1894);
Scott vs. Carew, 196 U. S., 100, (1905);
Spaulding vs. Martin, 11 Wis., 262, (1860);
Leavenworth vs. United States, 92 U. S. 733, (1875);

that the act of June 26, 1834, did not apply to the case, and said,

"But we go further and say that, whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation or sale would be construed to embrace it or to operate upon it, although no reservation were made of it." (513.)

In Leavenworth, L. & G. Rd. vs. U. S., it was held that general words in a grant of lands do not include an Indian reservation.

Bill by United States to confirm and establish its title to, and enjoin appellant company from setting up any right or title to, certain tracts of land situated within the Osage ceded lands in Kansas.

The possession of the lands in question previous to 1863 had been reserved by treaty to the Osages.

The granting act was approved March 3, 1863. The Osage treaty relinquishing the rights of the Indians was adopted September 29, 1865, and proclaimed January 21, 1867. Upon the act and the treaty, appellant company rested its claim to the lands in question, insisting that the act, although not operating upon any specific tracts until the road was located, then took effect upon those in controversy, as they, by reason of the extinction of the Osage title in the meanwhile, had become, in the proper sense of the term, public lands. The act was in the words: "There be and is hereby granted," which the court held to be words of absolute donation importing a grant *in praesenti,* and vesting a present title, which needed only a survey of the lands and location of the road to give precision to it and attach it to any particular tract; but holding that the lands in question, being reserved to the Indians at the date of the act, were not embraced in it.

The Court said,

"We are not without authority that the general words of this grant do not include an Indian reservation. In Wilcox vs. Jackson, 13 Pet., 498, the President by proclamation had ordered the sale of certain lands, without excepting therefrom a military reservation included within their boundaries. The proclamation was based on an act of Congress supposed to

authorize it; but this court held that the act did not apply, and then added, 'we go further and say, that whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, proclamation or sale would be construed to embrace or operate upon it, although no reservation were made of it.' It may be urged that it was not necessary, in deciding that case, to pass upon the question; but, however this may be, the principle asserted is sound and reasonable, and we accept it as a rule of construction. The supreme courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved. State vs. Delesdenier, 7 Tex., 76; Spaulding vs. Martin, 11 Wis., 274. It applies with more force to Indian, than to military, reservations. The latter are the absolute property of the government; in the former, other rights are vested. Congress cannot be supposed to grant them by a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose." (745.)

The law of 1847, therefore, did not authorize the President to reserve from sale the Indian Reserve.

The power conferred on the President by section 2 of the act above mentioned was to make reservation from the sales. The language conferring power on him is found in the exception, viz: "Excepting and reserving from such sales * * * * * * such reservations as the President shall deem necessary for public uses." Clearly no power was conferred on the President to reserve from sale, "until the necessary investigation can be made," lands like the Indian Reserve whose character was fixed as a permanent reservation, and which could not be sold. Nor can it be supposed that the President, in spite of the treaty creating the Indian Reserve, intended to devote the Reserve to the use of Fort Brady.

This proposition is made more clear by reference to the words of the executive order of September 2, 1847 (Comps. Ex. B), heretofore quoted, reserving for the use of Fort Brady, with other lands, section 6, in which the Indian Reserve was included. "Public lands" is the language of the order. Those are the lands to be reserved. Those words have a well known

signification and are used to describe such lands as are subject to sale, and did not include lands reserved and not public. (4).

In Spaulding vs. Martin, the court, by Justice Paine, says:

"The original title to the vast body of wild lands lying in the new states and territories, subject to such rights as are recognized in the Indian tribes, is in the United States. In respect to these lands it has pursued a wise and liberal policy. It has caused them to be surveyed as the advancing tide of settlement required, has disposed of them at small cost to individuals, and has frequently granted large tracts to aid in various public improvements. This has been, and is, well understood to be the purpose for which the government holds these lands. And the phrase 'public lands,' has a well known signification, limited to these only.

But on the other hand, the government of the United States has need of specific portions of land in various parts of the country, usually small tracts, for military or other purposes, necessary for the actual transaction of the business of the government. It has provided by law for the reservation of such tracts. They are known as "reservations," and there is a significance in the word. Reserved from what? Obviously reserved from disposition in the manner and for the purposes for which the general body of the public lands are disposed of. The very necessities of the government with respect to these reservations, take them out of the main body of public lands, and of the policy applicable thereto." (273.)

In Newhall vs. Sanger, the court said:

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

On this point Judge Severens says,

"That Congress did not intend by the act of 1847 that it should have any application to the Indian Reservation. That was already withdrawn from sale by a treaty which Congress was bound to respect * * *. The general language of the act and of the President's orders thereunder should be interpreted to be limited to the subject to which they could properly apply." (152 Fed. Rep. 35.) (Rec. 826.)

NOTE 4—Newhall vs. Sanger, 92 U. S., 761, (1875);
Doolan vs. Carr, 125 U. S., 618, (1887);
Spaulding vs. Martin, 11 Wis., 262, (1860).

RESERVATION.

The mainland, the patent to which is attacked herein, and over against which islands one and two lie, is the south bank of St. Mary's river for a distance of about 3,000 feet. (Comp. Ex. E.) Against this land there is a fall in the river of about 9 feet. (Rec. 264.) This land is a part of a tract of 36.50 acres, set apart as an Indian Reserve, for the use of Chippewa Indians for encampment for convenience of fishing, under treaty of June 16, 1820. (7 Stat. 206). The same appears as 36.50 acres, "**Indian Reserve,**" part of Section 6, Town 57 N., Range 1 E., as per first United States Survey by Mullet. (Comp. Ex. A.) The Indian right of occupancy was released by treaty August 2, 1855, proclaimed April 24, 1856. (11 Stat. 631-2.) (Rec. 12.) This Indian Reserve was cut in three parcels by the location and survey of the Canal Grant across the same. One of these parcels of land embraced 9.10¾ acres and is the mainland above referred to.

This was located with Porterfield Scrip by Wm. Chandler, May 17, 1881, and patented to him December 15, 1883. (Rec. 165, 180; Compl't. Rec. 14, 15.)

A. Reservation of April 3, 1847.

The lands in vicinity of the parcel in contention were surveyed in 1845, and this parcel is included within the bounds of Section 6, Town. 47 N., Range 1 E. (See Com. Rec. 7, 8.) Said lands were brought into market under act of Congress March 1st, 1847. (9 Stats. 146.) (Comp. Rec. 8.) Section 2 of this act excepts from sale "such reservations as the President shall deem necessary for public uses." Under this act an Executive order of reservation was made on April 3, 1847, reserving "until the requisite investigation can be had" the north half of fractional Town. 47 North, Range 1 East. (Rec. 137-8.)

B. Reservation of Sept. 2, 1847.

This reservation covered about one-sixth part of the reservation of April 3, 1847. But it included the business part of the village of Sault Ste. Marie. (Rec. 275, 294-5. See diagram 1.)

RESERVATION

On August 14, 1847, the Secretary of War had asked of Col. Abert of the topographical engineers, a "report upon the quantity of land which it would be expedient to reserve at the River St. Mary's, Michigan." Col. Abert reported,

"I have caused that part of the accompanying plat to be colored red which I would recommend to be reserved from sale.

This will cover all that will be necessary, in my judgment, both for military and other government purposes." (Comp. Ex. B.) (See diagram 1.)

Pursuant to this report of the engineer corps, the Secretary of War, on Aug. 25, 1847, wrote to the Commissioner of the General Land Office enclosing the report of Col. Abert and requested

"that you will cause to be reserved from sale the sections colored in red on the enclosed plat, embracing Sections 4, 5, and 6, of Township 47 North, Range 1 East. And an additional tract adjoining the last named Section on the west not designated by number on the plat." (Comp. Ex. B.)

This last tract was Fractional Sections 1 and 2 of Town. 47 North, Range 1 West.

Thereupon the order of September 2, 1847, was made, reserving from sale Fractional Sections 4, 5, and 6 of Range 1 East, and Fractional Sections 1 and 2 of Range 1 West, of Town. 47 North, "for the use of Fort Brady." (See diagram 1. Comp. Ex. B. and Rec. 139.)

C. Designation March 10, 1852, or D. C. A. H.

The reservation of September 2, 1847, included the growing and important village of Sault Ste. Marie, and the numerous private claims therein. (Rec. 275, 294-5.) Act Sept. 26, 1850 (9 Stat. 469) was passed providing for the adjustment of the private claims at Sault Ste. Marie and the designation, survey and platting of "lots necessary for military purposes" and "other public purposes" and "the Indian Agency Tract and of the Indian Reserve."

Under this act there was, on March 10, 1852, designated as sufficient "for other public purposes," the north fractional half of Section 1, Range 1 West, and that part of the north

half of fractional Section 6, Range 1 E., lying west of Fort Brady Military Reservation, in Town. 47 North.

This tract was the D. C. A. H. of Complainant's Ex. 15 (Rec. 145-148.) (See diagram 1.) Still there was clamor for further reduction of reservation.

D. **Designation Aug. 5, 1852, or A. E. F. G.**

On August 5, 1852, there was designated "for other public purposes" in lieu of D. C. A. H. of Complainant's Ex. 15, (Rec. 145-148), the parcel A. E. F. G. of Complainant's Ex. "C" attached to the complaint. (See diagram 1.)

The reservations of April 3, 1847, and September 2, 1847, and the designations of March 10, 1852, D. C. A. H., and August 5, 1852, A. E. F. G., each included the parcel of land in contention, within their outer bounds.

RELEASE FROM RESERVATION.

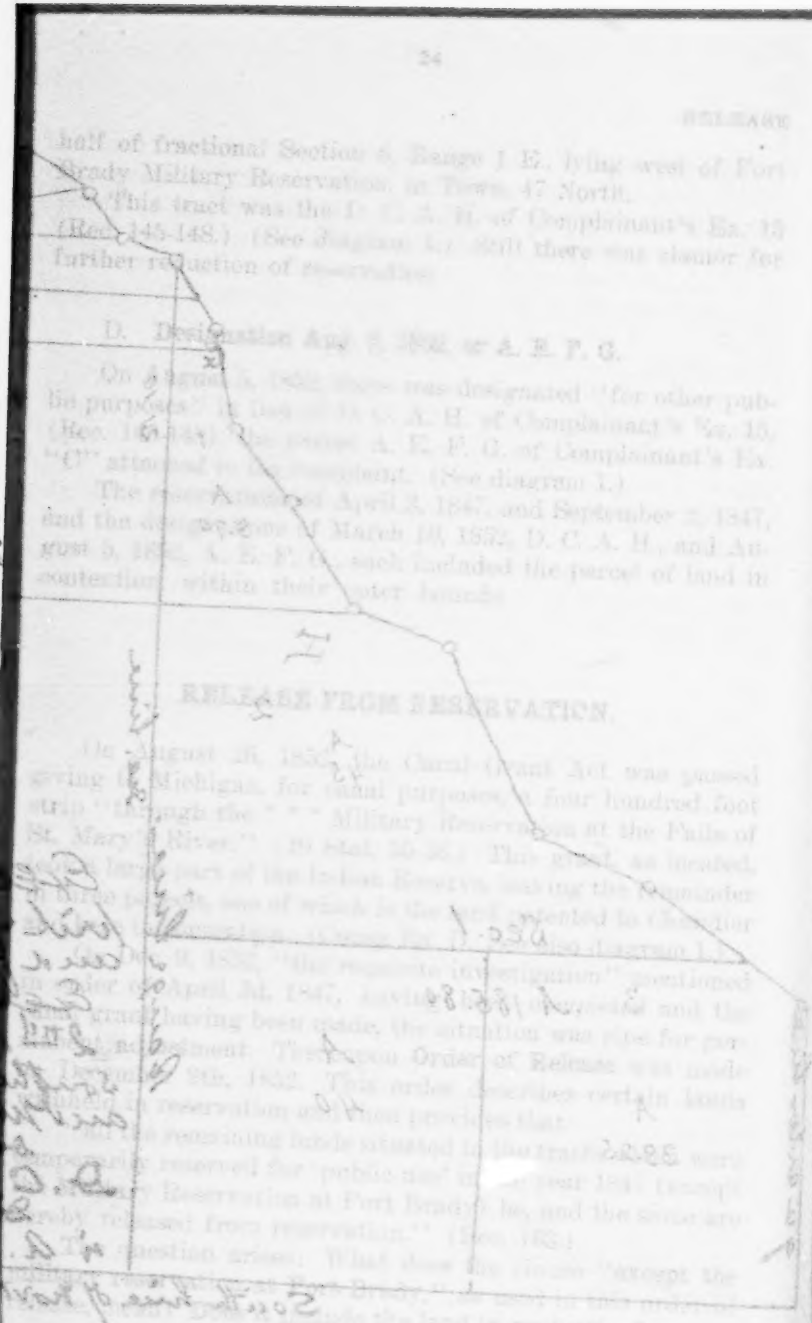
On August 26, 1852, the Canal Grant Act was passed giving to Michigan, for canal purposes, a four hundred foot strip "through the * * * Military Reservation at the Falls of St. Mary's River." (10 Stat. 35-36.) This grant, as located, took a large part of the Indian Reserve, leaving the remainder in three parcels, one of which is the land patented to Chandler and here in contention. (Comp. Ex. D. See also diagram 1.)

On Dec. 9, 1852, "the requisite investigation" mentioned in order of April 3d, 1847, having been completed and the canal grant having been made, the situation was ripe for permanent adjustment. Thereupon **Order of Release** was made on December 9th, 1852. This order describes certain lands withheld in reservation and then provides that

"all the remaining lands situated in the tracts which were temporarily reserved for 'public use' in the year 1847 (except the Military Reservation at Fort Brady) be, and the same are hereby released from reservation." (Rec. 163.)

The question arises: What does the clause "**except the military reservation at Fort Brady,**" as used in this order of release, mean? **Does it include the land in contention?**

1
A
9.70
2.10
H
2
A
45
Sec. 1
3
A 185.80
A
40
A
39.25
Range line
Sec. line
Exec
trib
and
Exec
2nd
southe
and
D. C.
& A.
South line of North



RELEASE

Complainant declares this clause to have meant "either the reservation established by the President's order of September 2, 1847, or the reservation which had been established by the military department of the government under the act of September 26, 1850, as aforesaid, both of which included the land embraced in the so-called Indian Reservation." (Comp. Rec. 12.) In either case it would include the land in contention.

The designation (improperly named reservation by counsel) under act Sept. 26, 1850, (9 Stat. 469) was of the tract A. E. F. G. (See Comp. Exhibit C, Rec. 160, and Comp. diagram 1.)

The question of reservation of the tract in controversy at the time of its location, in 1881, is thus made by complainant to rest, as of course it must, on the meaning of the clause **"except the Military Reservation at Fort Brady."**

So the problem is, did such clause mean **reservation** as per Executive order of **September 2, 1847,** or the **designation** A. E. F. G. of the War Department of **Aug. 5, 1852,** as complainant contends? (Comp. Rec. 10, Ex. "C," Rec. 160) If the clause meant neither of these, then, evidently, as complainant must concede, it meant, as defendant contends, "the Military Reservation at Fort Brady," as per Wescott's survey. In that case, the Executive order of December 9, 1852, released the land in controversy from such reservation as it was under, if any, other than the Indian right of occupancy by treaty.

First. We then inquire, did the clause **"except the Military Reservation at Fort Brady" mean the executive reservation of September 2, 1847?**

(a) The language of the order excludes such interpretation. The order does not relate, as stated in the complaint, (Rec. 12) to "the various tracts which had been temporarily reserved for public use on April 3, 1847," but "the tracts which were temporarily reserved for 'public uses' in the year 1847, ('except, etc."), thus including in the release the lands specified in Order of Sept. 2nd, as well as in Order of April 3rd. (Rec. 163.)

(b) The business part, and nearly the entire residence part, of the city of Sault Ste. Marie lies within the limits of Executive order of reservation of September 2, 1847,—that is, in the north half of Section 6. (Rec. 275-294-5.) If complainant's interpretation of the clause is correct, then the city of Sault Ste. Marie is under Executive reservation.

It is not an anaswer to this suggestion to say that Congress had the power to grant private claims encroaching upon reservations. The act of September 26, 1850 (9 Stat. 469) plainly shows that Congress did not intend that any reservation should be encroached upon by any private claim. The Register and Receiver understood that they were not permitted to, and that they did not, confirm any private claim any part of which so encroached. They said "and in no instance have we confirmed claims, or any portion of the same, within such reservations." (Rec. 666.)

(c) This reservation of 2nd September, 1847, covered fractional secs. 4, 5, and 6, Town. 47 North, Range 1 East, and fractional secs. 1 and 2, Town. 47 North, Range 1 West (Comp. Ex. "B"). John Torrent applied to locate Porterfield Scrip on fractional sec. 2, Town. 47 North, Range 1 West. On appeal, it was held by Commissioner of the General Land Office, Lamoreaux, on full contention and argument, that the clause "**Military Reservation at Fort Brady**" did not refer to reservation by order of September 2, reversing his former decision that it did so refer. (Final Decision of Comr. Lamoreaux on Torrent's appeal.) (Rec. 323-327.)

(d) All, or nearly all, the private claims, the designation and protection of which was the object of act of Sept. 26, 1850, (9 Stat. 469) lay within the limits of this reservation of Sept. 2, 1847. It can hardly be supposed that the executive on Dec. 9th, 1852, intended to leave them still under reservation.

(e) On October 29, 1873, the Commissioner of Indian Affairs wrote to the Secretary of the Interior, recommending

"that the Commissioner of the General Land Office may

be notified that the said reserve (Indian Agency Reserve), the same being a part of Section 5, Town. 47 North, Range 1 E., is no longer needed for Indian purposes, to the end that the reserve may be disposed of according to law under the rules and regulations of the General Land Office." (Rec. 741, 2.)

The Secretary of the Interior approved of this suggestion on the 30th of October, and on the 18th of November, 1873, the Commissioner of the General Land Office wrote the Register and Receiver at Marquette, Michigan, directing him to offer the lands for sale, saying,

"The tracts to be disposed of are in Section 5, T. 47 N., R. 1 E., and are designated on the plat herewith inclosed and marked as first part Indian Agency Reservation, area 7.23 acres, and second part Indian Agency Reservation, area 19.10 acres." (Rec. 742.)

Thereupon such proceedings were had that the Indian Agency Reserve was sold according to Whelpley's survey and patent made of same to James P. Pendill. (Rec. 328-9.) (Whelpley's map, Compt. Ex. E.) (Ex. 23, Rec. 392-3.)

This is part of the land covered by Ex. order September 2, 1847.

(f) Further. All argument to point that "except the Military Reservation at Fort Brady" did not mean the A. E. F. G. designated by the War Department on August 5, 1852, is equally applicable to point that it did not mean the reservation of September 2, 1847.

Second. On the one hand, the complainant contends that the clause "except the Military Reservation at Fort Brady" meant the Military Reservation proper at Fort Brady, substantially as surveyed by Westcott, and in addition thereto the tract A. E. F. G. designated by the War Department as necessary for "other purposes than military" on August 3, 1852. (Exhibit C, of Comp'ts' bill. Rec. 160.) On the other hand, the defendant claims that this clause "except the Military Reservation at Fort Brady" meant the Fort Brady Mili-

tary Reservation proper as surveyed by Westcott in 1846. (Rec. 196-7-8.) Which contention is correct?

No doubt will remain respecting the meaning of the clause "Military Reservation at Fort Brady" if we give careful attention to the history of the dealings of the various departments with this "Military Reservation at Fort Brady" and the reservations in the vicinity of Fort Brady for other public purposes than military. There are many documents in divers departments respecting this matter. Not all are entirely consistent. Inaccurate expressions sometimes occur. But a patient examination removes all confusion and doubt.

There are many expressions in many documents, notably those relating to the McKnight Railroad, and the Canal Grant Act, of August 26, 1852, (10 Stat. 35), wherein the reserved lands at the Falls of St. Mary's River are spoken of as "the Military Reserve" and "the Military Reservation," and the "Military Reserve at Sault Ste. Marie" and "Military Reservation near Fort Brady," and "Military Reserve at this place." (Rec. 749, 752, 754, 756.)

At an early day, and before Wescott's survey, the question of Reservation at this place was very much in the air. The views respecting it were very indefinite. Wescott himself spoke of it in a letter to Lieut. Woodbridge at Detroit, dated August 18, 1846, thus, "all of which within four miles square is alleged to be a military reserve." (Rec. 756.) He further adds that some contend "that no military reserve exists or has ever been made." (Rec. 746.) But we find only one instance of the use of the expression "the Military Reservation at," of, or for "Fort Brady" in reference to any other property than the Fort Brady reservation as surveyed by Wescott in 1846. Such one use is in the letter of the Commissioner of the General Land Office to the Register and Receiver of the 9th of June, 1853. (Rec. 741.) Respecting this see later herein.

Act Congress, Sept. 26, 1850 (9 Stat. 469), used the words "the position and the extent of lots necessary for military purposes, as also the position and the extent of any other lot or lots, which may be required for other public purposes." This plainly distinguishes between "Military purposes" and "other public purposes." This distinction was kept in mind by all officers from the passage of this act to the last official

act growing out of its execution, one of which acts was the order of release of Dec. 9th, 1852. (5.)

NOTE 5—Letter Com'r G. L. O. to R. & R., Aug. 14, 1851 (Rec. 139-0).
Com'r G. L. O. to Sec'y War, Aug. 14, 1851 (Rec. 146);
Col. Abert to Sec'y War, Sep. 12, 1851 (Rec. 147-8);
Q. M. G. to Sec'y War, Jan. 27, 1852 (Rec. 14);
Sec'y War to Comr. G. L. O., March 10, 1852 (Rec. 146);
Com'r G. L. O. to Sec'y Int., April 29, 1852 (Rec. 150-1);
Sec'y Int .to Sec'y War, May 7, 1852 (Rec. 151);
"The Military and other public reservations proposed."
Com'r G. L. O. to Sec'y Int., April 30, 1852 (Rec. 740);
Col. Abert to Sec'y War, May 11, 1852 (Rec. 153);
"The Fort Brady or Military Reserve * * * Reservation for canal and other purposes."
Sec'y War to Sec'y Int., May 25, 1852 (Rec. 152);
"For Military and other public purposes."
Col. Abert to Sec'y War, June 17, 1852 (Rec. 154);
Col. Abert to Sec'y War, June 21, 1852 (Rec. 155);
Com'r G. L. O. to Sec'y Int. (Rec. 156);
"The extent of the Military reservation at Fort Brady."
Com'r G. L. O. to Reg. & Rec., Oct. 21, 1852 (Rec 309-0);
Com'r G. L. O. to Sec'y Int., Dec. 2, 1852 (Rec. 161);
Com'r G. L. O. to Sec'y Int., Dec. 2, 1852 (Rec. 311);
Sec'y Int. to Sec'y War, Feb. 7, 1853 (Rec. 313);
R. & R. to Com'r G. L. O., April 4, 1853. Report on private claims (Rec. 666);
Col. Abert to Sec'y War, Feb. 10, 1853 (Rec. 157-8);
"To the end that the western limit of the Fort Brady reservation be made to coincide with the line a b c d of the land office map." (Exhibit C to Compt's Bill).
Com'r G. L. O. to R. & R., Feb. 15, 1853 (Rec. 158-9);
R. & R. to Com'r G. L. O., March 12, 1855 (Rec. 757-8).

Also note one semi-official document, the letter of Conger and others to the General Land Office. This letter started the official action to reduce the extent of reservation to actual needs. (Rec. 148-9.) In his opinion herein Judge Severens gives prominent place to this document as proof of the then "Common understanding of what was considered as the 'Military Reservation at Fort Brady.'" (152 Fed. 33-4.)

"The Military Reservation at Fort Brady" meant the Military Reservation proper, substantially as surveyed by Wescott in 1846.

(a) The language of the clause is "except the Military Reservation at Fort Brady." All else is released. **"The Military Reservation at Fort Brady"** was well defined from 1845 to 1875. In 1845, when ordinary United States Survey was made by Mullett, it was marked only by some indefinite lines of actual occupation. On the plat of United States Survey was then shown "Indian Reserve," "Reservation Fort Brady" and "Methodist Missionary Reserve." The outer bounds of "Indian Reserve" and "Methodist Missionary Reserve" were fixed by Mullet. But outer bounds of "Reservation Fort Brady" were not fixed. (Comp. Ex. A.) (Rec. 92-3, 744, 5, 6, 197.)

Soon after ordinary survey of 1845, it became desirable, on account of the crowding in of settlements and private claims, to have the limits of "the Military Reservation at Fort Brady" more sharply defined. Hence, on October 3, 1846, the Secretary of War wrote to the Adjutant General, saying,

"The Limits of the Lands occupied for military purposes adjacent to Fort Brady, not having been defined by actual survey and reservation, questions of title have arisen with regard to them, and a suit has been brought against an officer of the Army for asserting the claim of the Department by removing fences erected thereon. * * * * * These limits when determined on, will be reported by this Department to the President for reservation, and the remainder, if any, of the tract now on military occupation, will be relinquished." (Rec. 198.)

On October 6, 1846, Adjutant General Jones directed Gen. Brady to report on the subject, (Rec. 305, 6), and on Dec. 11, 1846, Gen. Brady reported to Gen. Jones with Wescott's map,

fixing the exact limits of Fort Brady Military Reservation. (See diagram 1.) He said,

"This he has done so correctly that Mr. Lyon, the Surveyor General, has, from it, been able to trace on the map you sent me what you desired me to do." (Brady to Jones, Dec. 11, 1846. Rec. 197.)

By use of this map, Surveyor General Lyon laid down this survey of Fort Brady Military Reservation on the plat of ordinary United States Survey, and requested the General Land Office "to make the corresponding alterations on the plat in (his) your office." (Letter June 9, 1847, and plat.) (Comp. Ex. A, and Deft's Ex. 3, and Rec. 308.)

This military reservation embraced 29½ acres as per Wescott's Survey (Comp. Ex. 36. Rec. 197, 198), and 31.65 acres as per Whelpley's Survey (Comp. Ex. E), and "about thirty acres" as per War Department's History of Fort Brady (Rec. 307), and 29.80 acres as per Public Land Commission (Report Vol. II, p. 1127). It was distant nearly a quarter of a mile from the Indian Reserve. (Whelpley's map and field notes. Rec. 390.) (Wescott's map and field notes. Comp. Ex. A.) (See diagram 1.)

(b) **A History of Fort Brady**, found in War Department, evidently written after March 3, 1875, says,

"By executive order December 9, 1852, which declared certain light house reservations, all the remaining lands situated in the tracts, which were temporarily reserved for 'public use' in the year 1847, except **the military reservation at Fort Brady with an area of about thirty acres**, were restored to the public domain." (Rec. 307.)

(c) "Fort Brady.—Included within a reservation originally made April 3, 1847, or north half of township 47 N., range 1 E. Present reserve is in sections 5 and 6 of that township, and its limits were designated by the War Department, under act of Congress approved September 26, 1850 (No. 517, sec. 2). It contained an area of 29.80 acres. By act of Congress approved March 3, 1875 (No. 586), one and twenty-six hundredths acres were granted for school purposes, and

certain streets were established. Exact area of reservation remaining, not known."

(Report of Public Land Commission, Dec. 1st, 1880-1. Local and Temporary, Vol. 11, p. 1177. 46th Congress, 3rd Ses., Ex. Doc. 47, p. 13.)

(d) On February 26, 1853, the Commissioner of the General Land Office wrote to the Register and Receiver at Sault Ste. Marie calling attention to the order of December 9, 1852, and saying in a P. S., "You will perceive that the President's order releases all the balance of the reservation of 1847 (except the existing reserve for Fort Brady) and you will so note them in your tract books and plats." (Rec. 711.)

(e) The A. E. F. G. of the War Department is shown on Exhibit "C" of Comp'ts Bill. It is distant at nearest point about 600 feet from the Fort Brady tract. It includes the Indian Reserve, the Canal Grant, and some other lands. The south line of the Canal Grant is substantially coincident with its south line, from west end to angle at F, whence it continues in a straight line to the river below, cutting the Indian Reservation into three parts, one being south and two north of same. (Testimony of Ripley. Rec. 237.) (Exhibits "A," "C," "D," "E.") (Diagram 1.)

It leaves to north of it part of the Executive reservation of June 10, 1882. The whole or parts of private claims 41, 50, 65 to 78 inclusive, 83 and 84, together with the docks of Sault Ste. Marie below the Rapids, lie north of the line A E F, and between it and the south line of the canal lands. (See Exhibits C, D and E of Compl'ts Bill. C same as complainant's exhibit 18. Rec. 152-156. Ripley's testimony, Rec. 237, Deft's Ex. 9, Rec. 321-2, Diagram 1.)

The report of Col. Abert, wherein this tract A. E. F. G. is first defined, shows that it was no longer regarded as having any relation to "the Military Reservation at Fort Brady." Col. Abert says, "Second. I repeat the former recommendation, that the western line of the Fort Brady Reservation be the line a. b. c. d." (Rec. 154.) See the a. b. c. d. on the Abert map, Complainant's Exhibit C.

RELEASE

(f) This designation A. E. F. G. had come about thus: On March 10, 1852, the Secretary of War designated under said act as "the position and extent of lots necessary for military purposes, and also the position and extent of any other lot or lots which may be required for other public purposes," Fort Brady Military Reservation as per Wescott's survey and the land bounded on the east by same, (line D. C.), south by east and west quarter line of section 6 and 1 (line C. A. H.), and north and west by St. Mary's River. (See letter Secretary of War, March 10, Rec. 146, and map Compts. Ex. 15.) (See diagram 1.)

This designation was based on the report of Col. Abert of September 12, 1851, to Secretary of War, saying,

"**For military purposes, the present military reservation may be considered ample. But as a canal is contemplated in that quarter,** is necessary, and will have to be made, it is a question whether it may not be advisable to abstain from sales, until the canal be located. I have put upon the Land Office Survey the probable trace of the canal * * * * * Nearly all of the ground, west of the line C. D. and north of the line C. A. H. (Land Office Survey) will probably be found involved in settlements and pre-emption claims, and it is respectfully recommended that in addition to the military reservation, all the lands between the red line C. A. H. and the river, of the Land Office Survey, should for the present be reserved from sale." (Rec. 14.) (See diagram 1.)

The tract D. C. A. H. **designated March 10, 1852,** embraced a large part of the business portion of the Village of Sault Ste. Marie, and on April 2, 1852, (Rec. 148-9), the **citizens remonstrated** and Conger, Penniman, Cass and Felch concurred, conditioned only, "that the lands required for the **contemplated canal** shall not be interfered with."

On April 30, 1852, the Commissioner of the General Land Office wrote to the Secretary of the Interior respecting the remonstrances of the citizens, concurred in by Cass, Felch, Stuart and others, saying,

"The accompanying memorials signed by the Honorable Messrs. Cass, Felch, Stuart and others, which have been referred to this office for report, represent the importance of throwing into market such portions of those reserved lands as are now found not to be permanently needed for public uses.

This office is of the opinion that the time has arrived when the reservations alluded to may be circumstribed within the limits of public utility for Light House, Military, Naval or other public purposes. If such opinion is concurred in by the proper authorities, and in order to facilitate action in the premises, diagrams exhibiting the bodies of land so reserved are herewith submitted and after the Treasury, War, Navy and Interior Departments shall have designated all the permanent sites and circumjacent areas of land needed for Light House, Military, Naval and Indian purposes, the residue may be ordered by the Executive to be brought into market as desired by the Memorialists." (Rec. 740.)

Evidently the Secretary of the Interior concurred; and thereupon the General Land Office referred the matter back to the Secretary of War; and the Secretary of War called on Col. Abert for further information as to the reduction of the reserve for military and other purposes, and on June 17, 1852, Col. Abert reported:

"First: That the space tinted blue, and marked by the letters A. E. F. G., be reserved from sale. This reservation is intended to free from all embarrassment the space required for the future location of the canal.

Second: I repeat the former recommendations, that the western line of the Fort Brady Reservation be the line a, b, c, d." (Rec. 154.)

On June 21, 1852, Col. Abert further reported,

"In the map submitted to the consideration of the War Department, with a report from this office of the 17th instant, there is marked upon,

First: The position and extent of lots for military purposes, as far as the same can now be designated.

Second: The position and extent of other lots for other public purposes. **The only other public purposes known to this office,** for which land should be reserved, are the probable wants of the **contemplated canal;** for these purposes ample space is reserved and marked on the map which it attached to the reports from this office of the 17th instant." (Compts. Ex. "C.") (Rec. 155.)

Thereupon on August 5, 1852, the War Department sent to the General Land Office the map, Exhibit "C," saying,

"Agreeably to your request I have reconsidered the ac-

tion of this Department, communicated to you on the 10th day of March last as to the extent of the Military Reserve at Fort Brady. * * * * * * * I shall be guided by this opinion. And accordingly recommend that all the vacant space around the fort included within the given limits X. Y. Z. O. be retained. * * * * * *

As regards the **reserves for other purposes** than military, I refer you to the report of the Chief of the Topographical Bureau and map." (See Compt. Exhibit "C" for tract A. E. F. G.) (Also diagram 1.)

(g) All this work was not by way of, or preparatory to, reservation, as Sections 4, 5 and 6, were all then, if ever, under reservation by Executive order September 2, 1847, unless such reservation was abrogated by Act September 26, 1850. (9 Stat. 469.)

The action of War Department March 10 and September 2, 1852, was **not reservation, but designation** under Section 2, Act September 26, 1850, (9 Stat. 469), requiring "the Secretary of War to direct the proper military officer * * to designate or cause to be designated * * the position and the extent of lots necessary for military purposes, as also the position and extent of any lot or lots which may be required for other public purposes" than military. It was **preparatory to release from reservation** under pressure from settlers, and private claimants.

In all these documents, it plainly appears that the **"Military Reservation at (for or of) Fort Brady"** meant the tract of about thirty acres around and including Fort Brady as surveyed by Wescott; and not the tract A. E. F. G. which was, by all officials, including the War Department, designated as desirable "for other public purposes," that is, "Canal purposes," **the only other known "public purpose."**

(h) **Canal Reserve.**

On Aug. 26, 1852, (11 Stat. 35), Congress granted to Michigan for **canal purposes a four hundred foot strip** to be located "through the public lands known as the military reservation at the Falls of St. Mary's River." By "Military Reservation" as used in this act, complainant says Congress meant "the

reservation 'for other public purposes' designated by the Military Department." (Rec. 11.)

In Spalding vs. Chandler (160 U. S. 394 at 398), Mr. Justice White says the Village of Sault Ste. Marie "included within its boundaries the **military reserve of Fort Brady and the Indian Reserve.** * * * * * * and the Commissioner advised the Register and Receiver that the Secretary of War approved of the Wescott Survey as the true limits of the military reservation." * * * * (399.) "The Military Reserve noted on the Whelpley map lay outside of and to the east of the Indian Reserve." "The land actually appropriated for the then use of Fort Brady was located considerably to the east of the Indian Reserve, and private settlements were made upon the intervening lands." (P. 405.)

True, the Canal Grant act gave the right of locating a canal "through the public lands known as the Military reservation at the Falls of St. Mary's River." The land referred to was, no doubt, outside the Fort Brady Military Reservation and inside A. E. F. G. and the designation Military Reservation was evidently a misnomer, as supposed by Mr. Justice White. (See Spalding vs. Chandler at page 406.) As Mr. Justice White says,

"It is true that the act of August 26, 1852, c. 92 (10 Stat. 35), which granted to the State of Michigan the right of locating a canal through the public lands, known as the military reservation at the Falls at St. Mary's River, in said State, authorized, by such description, the location of the canal mainly across and through the Indian Reserve. It seems probable that the bill in question was drafted after consultation with, and the approval of, the War Department, the officials of which department had, in 1847, sought the reservation by the President of lands at Sault Ste. Marie, in the belief that a canal was not a far distant possibility; and the designation of the land in question, as the military reservation, may properly be ascribed to that source."

The Whelpley map (Comp. Ex. "E" or 23) shows how the Indian Reserve was cut into three parcels by the Canal Grant and its location. (See diagram 1.)

(i) **On December 9, 1852,** the situation was this: The Military Reservation at Fort Brady, as per Wescott's survey,

had been approved and held sufficient by the War Department. The Canal Grant had been legislated, and located by survey within the boundaries of A. E. F. G., the tract designated as sufficient for "other public purposes," (Rec. 666), though the location had not been approved. Neither the Land Department nor the War Department knew of any other public purposes for which reservations were desirable at this point. (Rec. 155-6.) (Comp. Ex. "C.")

Private claimants and settlers were clamoring, and the citizens of Sault Ste. Marie were anxious to have all lands, not desired for public use, put to a commercial and residence use, for the common good. (Letter of Conger and others, Rec. 148-9.)

The Commissioner of the General Land Office, moved by the remonstrances of the citizens, had said to the Secretary of the Interior.

"This office is of the opinion that the time has arrived when the reservations alluded to may be circumscribed within the limits of public utility for Light House, Military, Naval or other public purposes. If such opinion is concurred in by the proper authorities, and in order to facilitate action in the premises, diagrams exhibiting the bodies of land so reserved are herewith submitted and after the Treasury, War, Navy and Interior Departments shall have designated all the permanent sites and circumjacent areas of land needed for Light House, Military, Naval and Indian Purposes, the residue may be ordered by the Executive to be brought into market." (Rec. 740.)

Under such conditions, there came about the Executive order of December 9, 1852, releasing from reservation all the lands covered by reservations of 1847, excepting certain lands specifically described, and excepting **"the Military Reservation at Fort Brady."** (Rec. 163.)

Thereupon the Commissioner of the General Land Office wrote the Register and Receiver on February 26, 1853, giving his interpretation of this order, saying,

"P. S. You will perceive that the President's order releases all the balance of the reservation of 1847 (except the existing reserve for Fort Brady) and you will so note them in your tract books and plats." (Rec. 311-2.)

(j) If the tract A. E. F. G. was included within the exception "except the Military Reservation at Fort Brady," in the Executive Order of release of December 9, 1852, then the boundaries of this parcel A. E. F. G. should have been run and marked and exhibited on his plat by Surveyor Whelpley, pursuant to Section 7 of act of September 26, 1850, requiring him to designate "the lots reserved for Military or other purposes, according to the extent and limits of the same." (9 Stat. 471.) On the contrary, he did not survey or mark any such boundaries, or show any such reserve in his plan. On the contrary, he surveyed and subdivided and represented on his map the land comprising the tract A. E. F. G. on the basis that it had been released from reservation, except so far as included in the canal strip. His survey and map were approved by the Register and Receiver, the Surveyor General and the General Land Office.

Can we doubt that the excepted parcel "**the Military Reservation at Fort Brady**" meant the Reserve substantially as per Wescott's survey? The "other public purposes," "canal purposes," were provided for by the Canal Grant, the boundaries of which, if not then certain, could be made certain by approval of the survey already made, or resurvey and approval. No other public uses or purposes were then known.

To say that "the Military Reservation at Fort Brady" meant not the Military Reservation at Fort Brady, but such Military reservation and also, in addition thereto, a parcel of land distinct, separate and distant from the same, reserved for canal purposes, the only other public purpose known, reminds us of the epitaph of Mary Brown:

"The last remains of Mary Jones
Lie buried underneath these stones.
Her name was Brown. The name of Jones
Is used because it rhymes with stones."

Third. **Contemporaneous Official Interpretation.**

The clause "except the Military Reservation at Fort Brady" was interpreted by the **Register** and **Receiver** as releasing all of A. E. F. G. except the Canal Strip. See confirmation of private claims Nos. 3, 4, 5, 95, and 96. (Rec. 315-6.) Also approval of entry by Chandler, which included part of A. E. F. G. (Rec. 167, 170.)

RELEASE

Also recommendation Register and Receiver, March 12, 1855, "that right of way for railroad" be granted to the Chippewa Portage Company "from their dock on the west line of the Military Reserve at Fort Brady running along Water Street * * * to the east side of the Indian Reserve." (Rec. 758.)

Also see report of Register and Receiver regarding confirmation of private claims, dated April 4, 1853. (Rec. 666.) Therein the Register and Receiver say,

"In accordance with the second section of said act and the instructions, the Military Reservation of Fort Brady, according to 'Wescott's Survey' so called, the Indian Reserve and Indian Agency Reserve and the Ste. Marie Canal Reservation of four hundred feet in width, as located by Capt. Canfield on the 14th day of October, 1852, acting under authority from the Governor of Michigan, have been designated on the plat of the public survey of said village accompanying our abstracts, and our adjudications have been confined strictly to claims outside of said Reservations; and in no instance have we confirmed claims, or any portion of the same, within said Reservations."

Also confirmation of Alva Cable's claim, No. 131, gives as a boundary "the west side of the Military Reserve at Fort Brady." (Rec. 319, 495.)

Also see approval of Whelpley's Survey and Map.

Also by Special Deputy Surveyor Whelpley. (Ante .)

It was also so construed by the **General Land Office.**

See letter General Land Office to Secretary of the Interior, February 7, 1853. (Rec. 313.)

See letter General Land Office to Register and Receiver, February 15, 1853. (Rec. 158-9.)

Also General Land Office to Register and Receiver, February 26, 1853 (Rec. 311-2), to which letter postscript is added referring to such Executive order as follows:

"You will perceive that the President's Order releases all the balance of the reservation of 1847 (except the existing reserve for Fort Brady) and you will so note them in your tract books and plats."

Also letter General Land Office to Register and Receiver, October 13, 1881. (Rec. 171-2.) Also affirmation by Commissioner of the confirmation by the Register and Receiver of private claims Nos. 3, 4, 5, 95, and 96 (Deft. Ex. 8, Rec. 315.). Also

by patent of said private claims, and vacant lot No. 3 (Deft. Ex. 7, Rec. 313-4), and the Chandler parcel herein involved by the United States. These parcels, together with Executive reservations of June 10, 1882, and May 18, 1885, include all of the tract A. E. F. G.

Also approval Whelpley's Survey and Map.

Also by the **Surveyor General.** See his approval of Whelpley's Survey and Map.

Also by **Interior Department.**

See letter Secretary of the Interior to General Land Office, June 8, 1883. (Rec. 176-7-8.) Therein Secretary Teller says to the Commissioner of the General Land Office, after reciting the treaty of 1820 and folowing treaties, including the treaty of 1855 surrendering the right of fishing, and the passage of the act of Sept. 26, 1850:

"When released by the treaty of August 2, 1855, aforesaid, it became public land and was not subject to sale under the provisions of said act of September 26, 1850. * * * * The tract in question having in this manner become public land surveyed and not otherwise appropriated, it was subject to location by Porterfield Scrip at the time such location was made."

The reservation for the use of St. Mary's canal (reservation of June 28, 1881) was made some time after the scrip location, and was therefore subject to such location. (Rec. 178.)

See attempted reservation June 28, 1881. (Rec. 180-1-183.)

By the **Executive Department.**

See orders of reservation of June 10, 1882 (Rec. 321-2), (Deft. Ex. 9), and May 8, 1885 (Rec. 312-3.)

By **War Department.**

See requests for above orders of reservation. (Rec. 785-6-7, Comp. Ex. 70.)

Also Chief of Engineers to Secretary of War, October 10, 1888. (Rec. 791.)

Secretary of War to Secretary of Interior, October 12, 1888. (Rec. 792.)

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Secretary of War to President, October 12, 1888. (Rec. 792.)

See Secretary of War to Secretary of Interior, February 14, 1853. (Rec. 158.)

Chief of Engineers to Secretary of War, February 12, 1883. Rec. 186.)

Abert to Secretary of War, February 10, 1853. (Rec. 157-8.)

Also by **Congress.** See act March 3, 1875. (18 Stat. 519.)

It is therein enacted,

"That a certain portion of the Military Reservation of Fort Brady * * * * * containing 1.26 acres and bounded on the north by Portage Street, on the east by Church Street, on the south by Ridge Street, and on the west by the west line of said Military Reservation, be and the same is hereby donated to school district No. 1."

The "west line of said Military Reservation" appears plainly to be the west line of the Military Reservation at Fort Brady, according to Wescott's survey.

Contra.

First. On June 9th, 1853, the Com'r G. L. O. wrote a letter to the Reg. and Rec. which indicates that the Com'r gave to the Order of Release the interpretation contended for by complainant.

This might be evidence to the point, if it were not for the fact that it proves too much.

It asserts the Executive reservation of the 2nd of September, 1847, as then in force; and that "Sects. 4, 5, and 6, of T. 47 N., R. 1 E., Sects. 1 and 2 of T. 47 North, R. 1 West," still remain under reservation (Rec. 741).

Plainly this was an error of the Commissioner of the General Land Office or of some clerk who wrote, or furnished the material for, this letter; because these lands covered more than all the city of Sault Ste. Marie (Rec. 275, 294-5).

Respecting this letter, see also answer of R. & R. to same as per Spaulding vs. Chandler, 84 Mich., 140 at 142.

In respect to this letter, Judge Severens said,

"Counsel for appellant, however, point to an exception. This consists of a letter written by the Commissioner of the Land Office, Wilson, to the register and receiver of the district, June 9, 1853, in which the Commissioner made it apparent that he considered the reservation of the 2nd of September, 1847, still in force.

But in the letter of February 26, 1853, the same Commissioner had, as above stated, informed them that the President's order had released all the balance of the reservation of 1847 except the existing reserve for Ft. Brady and directed them to so note them in their tract books and plats." (152 Fed. Rep. 35-6.)

In his report to the Secretary of War, May 11, 1852, Col. Abert said,

"1st. That the western line of the Fort Brady Reservation should coincide with the marked line a. b. c. d. upon the map No. 2 (II) from the Land Office. * * * * *

2nd. That the reservation for canal and other purposes should be north of the line E. F. G." (Rec. 153.)

Then there was call through the Conger-Penniman letter for further reduction of reservation; and on 17th of June, 1852, Col. Abert again reported,

"1st. That the space tinted blue and marked by tthe letters A. E. F. G. be reserved from sale. This reservation is intended to free from all embarrassment the space required for the future location of the canal.

2nd. I repeat the former recommendation that the western line of the Fort Brady Reservation be the line a. b. c. d. * *

I again repeat the recommendation that the western boundary of the Fort Brady Reservation as now recommended, on the line a. b. c. d. be marked without delay by a post and wire fence."

The line a. b. c. d. referred to in both these reports coincides substantially with the western boundary of the Fort Brady reservation as surveyed by Westcott. (Comp's Ex. 18, 20, Ex. "C" of Compt.)

The exact location of the lines bounding the Fort Brady reservation as surveyed by Westcott was for a time not well settled. There was correspondence respecting it early in 1853 (Rec. 156-7-8-9). On February 7, 1853, the Comr. G. L. O.

writes to Sec'y Int. "relative to the extent of the military reservation at Fort Brady" (Rec. 156). This is the exact language we are seeking to interpret. It was used by the Comr. G. L. O. within sixty days after the Executive order of release. A reading of this letter and a report on the same by Col. Abert, Feb. 10, 1853 (Rec. 157-8), and instructions by Comr. G. L. O. to Reg. and Rec. pursuant thereto on February 15, 1853 (158-9), together with an examination of complainant's Exhibit 18 must convince the reader that the Sec'y Int., Comr. G. L. O., Sec'y of War, and Col. of Topographical Engineers interpreted "the military reservation at Fort Brady" to mean Fort Brady reservation as surveyed by Wescott.

Second. On May 7, 1852, the Secretary of the Interior wrote to the Secretary of War inquiring what portion of said tracts would be needed by the War Department. To this the Secretary of War replied on May 25, 1852, that no reservation would be required by his department within the region embraced by the maps submitted "except that at Fort Brady." (Rec. 151.)It is claimed that by this the Secretary of War clearly meant both the reservation for the military post and the neighboring reservation for public uses.

If by the words "except that at Fort Brady," the Secretary of War referred to the reservations in the vicinity of Fort Brady, it does not follow that the words "except that at Fort Brady" in this letter of May 25, 1852, meant the same as the words "the Military Reservation at Fort Brady," in the order of release December 9, 1852.

That they do not bear the same interpretation is apparent. To this effect note

(a) In his letter of May 7 to the Secretary of War, the Secretary of the Interior asked for a reduction of the area of reservation. To that end, he asks for a review "respecting the **military and other public reservations,**" plainly showing that the other reservations were not classed as **military**.

(b) The Secretary of War referred the letter of the Secretary of the Interior to the Bureau of Topographical Engineers, which bureau answered on May 11 (Rec. 153),

"These papers desire first a modification of the western line of what is usually denominated the Fort Brady or **mili-**

tary reserve, and second, a modification of the reserve, west of that line involving the Canal and railroad tract."

This still further shows that the term "military" was not applied to the Canal reserve.

(c) Col. Abert, the Topographical Engineer, further details,

1st. A modification which may be made in the western line of the Fort Brady reservation.

2nd. That the "reservation for canal and other purposes, should be north of the line E F G (probably A E F G).

3rd. * * In order to be more definitely understood, I have had the spaces so reserved, marked with a blue color upon the map No. 2, from the Land Office." (See Rec. pages 151-2-3 and Exhibit C attached to the complaint, being map No. 2 (II.)

Third. Counsel for complainant also relies upon proclamation for sale, 18th of May, 1853 (Rec. 797-801). This proclamation also proves too much. It omits Sects. 4, 5 and 6, T. 47 N., R. 1 E.

If there was no other cause of omission than the reservation of the tract A E F G, and the omission was only of such parcels as were cut into by such tract, then this evidence would be of some force. But the fact is that, in 1853, a large part of sections 4, 5 and 6 were under the burden of private claims, which then, and for long time theretofore, had existed, and which had been allowed by Congress, though not definitely located. This fact accounts for the omission of these sections from the proclamation of sale.

Further, Sections 4, 5 and the south half of section 6 were not withheld from sale on account of reservation, because A. E. F. G. did not touch any part of either of them.

Further, the Canal Grant cut into, and forbade the sale of, every subdivision of land cut into by tract A. E. F. G. (See diagram 1.)

The letter of Comr. G. L. O. to Sec'y of Int., May 4th, 1857, says that the lands released by Order Dec. 9th, 1852, were proclaimed to be "offered at public sale to commence on Monday, September 5, 1853." (Rec. 796.) This letter is a very general statement. It does not descend to particulars. It also proves

too much. As said before, Secs. 4, 5 and 6 included private claims which had not, in 1853, been survyed. Hence the necessity of omitting from sale all of such sections.

Do not the foregoing facts show conclusively that Executive order of December 9, 1852, released from reservation of Executive order of September 2, 1847, all "except the Military Reservation at Fort Brady," as surveyed by Wescott?

Otherwise what has become of all the action of the General Land Office, Interior Department, and War Department, in their attempts to narrow the limits of reservation at Sault Ste. Marie, pursuant to demands of settlement urged on the General Land Office by the letter of Conger, Penniman, and others? Does that all stand for naught?

Act of Congress.

But if above is not the proper interpretation of the order of release of December 9, 1852, then we claim that act of Congress, Aug. 26, 1850 (9 Stat. 469), for settlement of private claims, and official action in execution thereof, including the making of the Whelpley Map, the approval of the same by the Surveyor General, and by the Commissioner of the General Land Office, and placing the same on file in the General Land Office, all abrogated the Executive orders of reservation of April 3 and September 2, 1847. Especially so as to the Indian Reserve, to which such Executive orders of reservation certainly could not have attached, and become operative, until the ratification of the treaty of Aug. 2, 1855, which was on April 24, 1856 (11 Stat. 631-2), after the making of said surveys and the approval of the same and the filing of said map.

To that effect is the final decision of Commissioner Lamoreaux of the General Land Office in the Torrent case. Therein he says, after reviewing the entire matter and reversing his former decision,

"I am of the opinion that it" (the action of the War Department fixing the boundaries of the Fort Brady Military Reservation) "had the effect of restoring the **balance of the land** described in the Executive orders of April 3 and September 2, 1847, to the public domain; and that no further order of the Executive was necessary to complete the restoration." (Rec. 325.)

The uncontradicted proofs show action of the various departments, after the Executive order of release of December 9, 1852, dealing with **every square foot of tract A E F G** outside of the canal lands on basis that same was no longer under reservation.

Ryan vs. Brown proceeded upon ownership by Ryan of the riparian part of private claims 76 and 77, land within the tract A E F G, covering part of the St. Mary's docks below the canal. (18 Mich. 196.)

Scranton vs. Wheeler proceeded upon the ownership by Scranton of the riparian part of private claim 3, land within the tract A E F G. (179 U. S. 141.)

Former case defended by State of Michigan. Latter case defended by United States under special charge of War Department.

Value of **Contemporaneous Official Interpretation.**

"The weight of contemporaneous and long continued construction of a statute by those charged with its execution is well recognized in cases open to reasonable doubt." (6.)

NOTE 6—United States vs. Sweet, 189 U. S., 471 at 473 (1903);
United States vs. Johnston, 124 U. S., 236 at 253 (1888);
United States vs. Finnell, 185 U. S., 236 at 244 (1902);
Brown vs. Clements, 44 U. S., 650 at 670 (1845);
Gazzam vs. Phillips, 61 U. S., 372 (1857);
United States vs. Hancock, 133 U. S., 193 at 197 (1890);
Edwards vs. Darby, 25 U. S., 206 at 210 (1827);
Peabody vs. Stark, 83 U. S., 240, 243 (1872);
United States vs. Pugh, 99 U. S., 265 at 269 (1878);
Brown vs. United States, 113 U. S., 568 at 570-1 (1885);
United States vs. Philbrick, 120 U. S., 52 at 59 (1887);
Robertson vs. Downing, 127 U. S., 607 at 613 (1888);
United States vs. Railway, 142 U. S., 615 at 621 (1892);
United States vs. Bank, 31 U. S., 29 at 39 (1832);

RELEASE

Said by Mr. Justice Holmes in United States vs. Sweet, at 473.

In United States vs. Hancock, Mr. Justice Brewer said,

"If made in good faith and unchallenged as this has been for over fifteen years, whatever doubt may exist, its correctness must be resolved in favor of the title as patented." (197.)

On this point, the Court of Appeals, by Judge Severens, said,

"We have no doubt that by 'the Military Reservation at Fort Brady,' he intended the Fort Brady reservation as it was suitably described. * * * As we have said, the contemporaneous construction of the President's order was that the only exception made thereby was the Fort Brady Reservation and that construction was subsequently followed by those who were charged with the carrying the order into effect." (152 Fed. Rep. 35.) (Rec. 826.)

SURVEY.

Second. **The Land Had Been Legally Surveyed.**

MULLETT'S SURVEY.

Chapter 23, Laws of Congress, 1860, (12 Stat. 836), provides for issue of Porterfield Scrip "in quantities not less than forty acres," and that same may be located "on any of the public lands which have been or may be surveyed," "to be selected and located in conformity with the legal subdivisions of such surveys."

Of course, this meant a parcel of land legally and actually surveyed, not necessarily a rectangular parcel. Else all islands not equaling forty acres in extent would be barred. So would fractional parcels, especially those fractional parcels lying in more than one quarter section. But parcels of land, surveyed as separate subdivisions, including area lying in more than one quarter section, are held to be legal subdivisions. (7.)

In his instructions to the deputy, Mullett, the Surveyor General, said, respecting the Indian Reserve,

"There is an Indian Reservation of about 80 acres at the Sault Ste. Marie, for the Chippewas, as a place of encampment and for fishing. Mr. Schoolcraft reports that this survey has been located 'by the War Department in 1823, being a strip of land on the S. W. side of the falls, which is bounded by the U. S. Mill race, and its outlet, and about ⅛ of a mile above Fort Brady.' This reserve you will exclude from the survey and return a survey of its boundaries to this office." (Ex. 10, Rec. 130.)

"Reserve of 640 acres at Little Rapids, S. W. shore of the St. Mary's river, about two miles below Fort Brady, being site of the Methodist Mission. The above reserve you will exclude

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NOTE 7—Shufeldt vs. Spaulding, 37 Wis., 662 (1875);
Sheppard vs. Wilmott, 79 Wis., 15 at 19 (1891);
Wilson vs. Hoffman, 70 Mich., 552 (1888).
Same, if including area in different sections,
Lyons vs. Fairbanks, 79 Wis., 455 at 461 (1891);

from the survey, and return a survey of its boundaries to this office." (Ex. 10, Rec. 131.)

The boundaries of this reservation were actually run and marked by Deputy Surveyor Mullett in 1845, so that the Surveyor General caused the area to be calculated and fixed at 36.50 acres (Comp. Ex. "A.") (Rec. 228.) Same lay partly in Northeast quarter, and partly in Northwest quarter of Section 6, Town. 47 North, Range 1 East. It was separated by the survey from the other public lands. (Comp. Ex. "A.") This survey was under instructions from Surveyor General to the Deputy Surveyor Mullett, directing in relation to it, "This reserve you will exclude from the survey and return a survey of its boundaries to this office." (Rec. 131.)

Same directions were given as to Methodist Missionary Reserve (Rec. 131), while the directions as to reservations generally were, simply, that they be not surveyed.

It seems to have been the continuous policy of the government to survey lands so that the place and area of each parcel, equal to the minimum size purchaseable, should be fixed, and to provide for no other or further subdivision. (8.)

Evidently the object of a survey is to make area and place certain. The place and area of the Indian Reserve was completely fixed by Mullett's Survey, and the area, 36.50 acres, was less than the minimum size of purchaseable parcels, which was then, and ever since has been, forty acres, except in case of fractions. (8.)

The "Methodist Missionary Reserve," though containing 640 acres, was patented on Mullett's Survey (Rec. pp. 674-5-6).

NOTE 8—Acts of Congress provide for survey of lands into, and sales in, parcels not less than as follows:

Act, May 18, 1796 (1 Stat. 464) Sections.
Act, May 10, 1800 (2 Stat. 73) Half-sections.
Act, March 26, 1804 (2 Stat. 277) Quarter-sections.
Act, February 22, 1817 (3 Stat. 346) Half Quarter-sections.
Act, April 5, 1852 (4 Stat. 503) Quarter Quarter-sections.

This was done pursuant to Act of Congress Ch. 189, June 22, 1860 (12 Stat. 88). But the instructions of the Surveyor General to Mullett were the same respecting this reserve as respecting the Indian Reserve (Ex. 10, Rec. p. 131).

Adsit's entry of the Indian Reserve was sustained on Mullett's Survey. The register's and receiver's certificate allowing his entry says "that it was surveyed in 1845 and the contents ascertained as appears by our maps." Adsit's entry was set aside on other grounds by the Commissioner of the General Land Office. See Spalding vs. Chandler, 84 Mich., 140, 142. At page 145, the Court says, "The land * * was surveyed by the United States as a reservation for the Indians."

If Canal Grant had not been made, and the Indian Reserve had remained intact, as surveyed by Mullett in 1845, Whelpley's duty would have been to re-run its exterior boundary as he did the original government lines of other parcels. The parcel would then have been ready for sale like the Indian Agency Reserve, and the Methodist Missionary Reserve, as soon as treaty of 1855 releasing Indian right of occupancy was ratified in 1856 (11 Stat. 631-2.)

The record shows a decision of the Interior Department by Acting Secretary Chandler (1893), to the point that lands embraced in an Indian Reserve are not officially surveyed by running of the exterior boundaries thereof. (Rec. 793-4.)

This decision relates to the Coeur d'Alene Indian Reservation. This included 736,000 acres. (Land Laws, Eminent Domain, 245 and 730.) (26 U. S. Stat. 1027-8. Rand-McNally Atlas of 1892, 318. Map of Idaho.) The Indians had seven thousand acres under cultivation. (Rand-McNally Atlas 317.) Hence, of course, the running of the outer boundaries of this reservation could not put it in the category of surveyed lands.

WHELPLEY'S SURVEY.

Section 7, Act of Congress, September 26, 1850 (Stat. 471), provides for the survey of the village of Sault Ste. Marie, and that the

"Deputy shall prepare a plat exhibiting in connection with the lines of the public surveys, the exterior lines of the whole village, also the squares, individual lots, and the public

lots, and also the outlots, designating the lots reserved for military or other purposes according to the extent and limits of the same, as fixed by the proper military officer, pursuant to the requirements of the second section of this act."

"A survey and plat were duly made in accordance with the provisions of said act by Thomas Whelpley" (Comp. Rec. 13). "A copy of said Whelpley's plat, so far as relates to said land, is filed herewith and made a part hereof, and marked exhibit "E." " (Comp. Rec. 13.)

Exhibit "E" gives boundaries of land involved, by same courses and distances as is given in the Chandler patent. (Compare exhibit "E" with patent, Rec. 178.)

Had Whelpley authority to survey the parcels into which the Canal Grant had cut the Indian Reserve?

(a) Section 7, act September 26, 1850, (9 Stat. 471) provides that the "Deputy (Whelpley, as the event determined) shall prepare a plat exhibiting in connection with the lines of the public surveys, the exterior lines of the whole village, also the squares, individual lots, and the public lots, and also the outlots, designating the lots reserved for military or other purposes according to the extent and limits of the same, as fixed by the proper military officer, pursuant to the requirements of the second section of this act."

"The lines of the public surveys," in connection with which "the exterior lines of the whole village" and "the lots reserved for military or other purposes" were to be shown or exhibited, included the boundaries of the Indian Reserve, as surveyed by Mullett in 1845. (See Second Section, act September 26, 1850. 9 Stat. 469). Whelpley actually re-run and corrected, as to course and distance, all the lines of the Wescott survey and of the Mullett survey, which touched the lines of the village. (Compare Whelpley's field notes, Rec. 373, 377, with Mullett's field notes, Comp. Ex. "A." and Wescott's field notes, Comp. Ex. 36, Rec. 196-7-8.)

This was necessary to complete survey of the private claims. He was not authorized to, and did not, change any monument or fixed point on these surveys. (Compare field notes as above.) But it was necessary to completion of his

work that he retrace these lines and correct errors in course and distance, as he did. It is not easy to see how he could locate and represent on his map all the private claims without fixing anew the courses and distances. If A. E. F. G. had remained in reservation, it would have been necessary for him to have surveyed that in order, both to "designate" that parcel on his plat, and to "exhibit" the private claims or individual lots.

(b) The necessity for surveying the Indian reserve would have been more apparent if, between the act of 1850 and the survey, the Canal Grant had not been made and located. Part of that came between the Indian Reserve and many private claims, so that the courses and length of divers of the lines of divers lots were determined by the Canal Grant survey. The Canal Grant cut the Indian Reserve in three parcels, and for a considerable distance lay between the remnants of such reserve and the private claims. Note that Portage Street and the Canal Grant border on the parcel of the reserve under consideration herein. Private claims Nos. 84 and 78, and Portage and Water Streets border on the parcel of the Reserve south of the Canal Grant.

Can it be supposed that Congress intended that any of the lands within the village should be left unsurveyed? When we read Sections 2 and 7, we cannot doubt that Congress intended that the map to be made by the deputy should show the location and boundaries of all parcels of land in the village:—that no further survey by the United States of any land in this village should be necessary.

Perhaps Congress intended that the officer designated by the War Department should survey the Indian Reserve, but evidently the War Department did not so construe the act. Col. Abert, to whom the matter was referred, reported as follows:

"Bureau of Topographical Engrs.
Washington, June 21, 1852.

Sir:

The 2d Section of a law of September 26, 1850, (Stats. at Large, Vol. 9, page 469) requires the War Department

'to designate, or cause to be designated, upon the map aforesaid, the position and extent of lots necessary for military

purposes, as also the position and extent of any other lot or lots which may be required for other public purposes, and also the position and extent of the Indian Agency tracts, and of the Indian Reserve,'

that is,

1st. Position and extent of the lots for military purposes.

2nd. Position and extent of other lots for other public purposes.

3rd. Position and extent of the Indian Agency.

4th. Position and extent of the Indian reserve.

In the map submitted to the consideration of the War Department, with a report from this office of the 17th instant, there is marked upon,

1st. The position and extent of lots for military purposes, as far as the same can now be designated.

2nd. The position and extent of other lots for other public purposes. The only other public purposes known to this office, for which land should be reserved, are the probable wants of the contemplated canal; for these purposes ample space is reserved and marked on the map which is attached to the reports from this office of the 17th instant.

3rd and 4th. Being uninformed of the Indian Agency, and of the Indian reserve, or of any necessity for such reservations in that quarter, no lots have been marked or designated for these purposes. If the object be a reserve upon which to erect an Indian Agency house, it is believed that ample space is provided in the present Military Reserve, out side of the Fort Brady pickets, for which purposes, if required, special lots of this reserve can be hereafter assigned. All of the letters and papers on this subject which have been referred to this office, are hereto affixed.

Respectfully Sir,
Your Ob't. Serv't.,
J. J. Abert,
Col. Corps T. Eng'r.

Hon. C. M. Conrad,
Secretary of War." (Rec. 155.)

This report was adopted and acted upon.

(c) There had been one survey by Deputy Edmunds, which had been approved by the Reg. and Rec. and the Sur-

veyor General, and sent to the General Land Office. But this had been rejected as inaccurate by the Commissioner. (See opinion of Secretary in Gamble vs. Sault Ste. Marie, 10 Land Decisions, 375.)

Also there had been a preliminary survey under the act by Deputy Mullett (Rec. 143-4-5), which also was insufficient. Mullett had been relieved and Whelpley employed. Such circumstances emphasized to Whelpley the necessity for thorough and complete work.

(d) Spalding vs. Chandler (160 U. S., 394), related to this land. Therein Mr. Justice White said (406),

"The map of the survey ordered to be made, of the village, was required to have noted upon it the boundaries, not only of the Military Reserve, but of the Indian Reserve."

The Canal Grant had been located, cutting, as Mr. Justice White says (P. 399) "the reservation into three parcels, two of which lay north of the canal and one south of the canal."

How could the map "have noted upon it the boundaries * * * * * of the Indian Reserve" without a survey of these three parcels?

(e) When the survey was certified to by Surveyor General and approved by him (September 4, 1855) these lands outside the Canal Grant had been released from reservation by order December 9, 1852 (Rec. 163), and the treaty for surrender of Indian right of occupancy had been signed, and its ratification was, no doubt, a foregone conclusion. (11 Stat. 631.)

Under these conditions was it not incumbent upon Whelpley, in carrying out the spirit of the act of September 26, 1850, (9 Stat. 469), to survey all the fractional parcels of the old Indian Reserve? If it was the duty of the War Department to make the survey necessary to completion of his map, as directed by Congress, and the War Department had failed, did it not become his duty to do this mere detail work necessary to completion of his own work, and to secure the results—a complete survey of the village—contemplated by Congress?

Contemporaneous Official Construction.

The view that act of September 26, 1850 (9 Stat. 469), did authorize such survey has been sanctioned by all concurrent and subsequent official action relating to same.

Register and **Receiver** approved of the plat and endorsed the same.

They approved of Chandler's location and certified on same, in written addition to printed blank, "the above described tract has been surveyed, and is not otherwise appropriated." (This refers to the Whelpley Survey.) (Reg. and Rec. certificate attached to Chandler's application. Rec. 170.)

The survey of the Indian Agency Reserve stands on same ground as to authority to survey. Whelpley surveyed that into two parcels. (See map. Defts. Ex. 12½, Rec. 330.)

Reg. and Rec. accepted entry of said parcels, and Land Office caused patents to be made to James P. Pendill. (See Pendill Patents. Rec. 328-9-0.) True, the Commissioner of the Land Office caused recalculation of the area of these parcels, but he used Whelpley's Survey to make the plat, and, of course, the calculations also. Difference between Whelpley's and Commissioner's calculation of area one-hundredth of an acre.

The **Surveyor General** approved of the survey and map of Whelpley. (His certificate on Whelpley Map, Rec. 163.)

The **General Land Office** approved of the survey and map.
By making same part of the records of his office.
By approval of Chandler's location.
By patent to Chandler.
By approval of entry of Pendill on two parcels of Indian Agency Reserve, as surveyed by Whelpley, and Patents to Pendill of the same, as above stated.

That these patents to Pendill rested on the Whelpley survey is apparent.

(a) Each patent recites that the same is "according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General." (Rec. p. 329-0). No survey of these lands was ever "returned to the General Land Office by the Surveyor General" except the Whelpley survey.

(b) Part one of the Indian agency reserve was sold for $161 per acre. Part two was sold for $36 per acre. On account of this high price per acre, it seems that the Commissioner of the General Land Office thought it wise to recalculate the area of these two parcels, which he did.

(c) Under date November 14, 1873, the Commissioner of the General Land Office and ex-officio Surveyor General of Michigan, certified on the plat of the Indian agency reserve as follows:

"I hereby certify that the above plat of the first and second part of the Indian agency reservation in the village of Sault Ste. Marie, Township 47 North, Range 1 East, in the state of Michigan, has been constructed from the field notes on file in this office, and areas calculated in pursuance of the act of Congress, approved 22nd of January, 1853."

This certificate is on complainant's exhibit 61, being part of the Indian agency reserve. By some accident same does not appear in the printed record.

(d) Compare Whelpley's field notes (Rec. 331-2, 392-3) and plat (Deft's Ex. 12½, Rec. 330) with special plat prepared under direction of the Commissioner of the General Land Office (Comp's Ex. 61, Rec. 737).

Interior Department approved of same.

Action on Chandler's application by Secretary Teller on 8th of June, 1883. (Rec. 176.) He says, "the tract contains 9.10¾ acres * * * * * and is a fractional part of Section 6 * * * * * as appears by an Official Survey made in 1855."

Letter Secretary of the Interior to General Land Office, June 28, 1881, (Rec. 182), referring to letter Sec. of War, 14th

of June, 1881, asking reservation of the parcel herein involved. (See letter General Land Office to Reg. and Rec., October 13, 1881. Copp Land Owner, Vol. 8, P. 144. Rec. 171-2-3.)

War Department approved of same.

It asked and procured reservation of the other two parcels of Indian Reserve, describing such parcels as they are described in Whelpley's Survey, though not using the words "Whelpley's Survey," (Letter Lincoln, Sec. of War, to President, 9th of June, 1882, and Executive Order 10th of June, 1882. Rec. 321-2.)

Also letter Gen. Wright to Sec. of War, February 12, 1883. (Rec. 186-7.)

Whelpley's Survey is adopted in this case by the Department of the Interior and the Department of Justice. That survey alone names these islands one and two. (Compt. Ex. A and E.) Without that survey of the Indian Reserve, the designation islands one and two is meaningless.

There is **other authority** for the survey of the fractional parts of the Indian reserve by Whelpley. The act of Congress of March 26, 1804 (2 Stat. 277), contains this provision:

"And it shall also be the duty of the said Surveyor General to cause to be run, surveyed and marked such of the Indian boundary lines of the said lands as have not yet been surveyed."

When in 1855, Whelpley was making his survey, the Canal act of 1852 had been passed. That act granted to Michigan, for canal purposes, a strip four hundred feet in width through the Indian reserve, thus reducing its area and leaving the remainder in three separate parcels. (See diagram 1.) If it can be said that those three parcels had "not yet been surveyed," it was Whelpley's duty to run and mark their boundaries under the act of 1804. Those parcels were surveyed and platted by him, and his plat and survey were adopted and approved by the Surveyor General and the Commissioner.

If, therefore, there be any question as to Whelpley's authority to survey the three fractions of the Indian reserve

LOSE TO EDGE

under act September 26, 1850, there can be no question as to the authority of the Surveyor General, under act of 1804, to direct Whelpley to survey them. His subsequent adoption of Whelpley's survey is equivalent to such direction.

Was there need of special authority from Congress to authorize the Surveyor General to cause this Indian Reserve to be surveyed by Whelpley? Is not the general law sufficient warrant for that purpose?

Act of May 18, 1796, (1 Stat. 464), provided that the Surveyor General should engage deputies

"whom he shall cause, without delay, to survey and mark the unascertained outlines of the land lying northwest of the River Ohio, and above the mouth of the River Kentucky, in which the titles of the Indian tribes have been extinguished."

Act of March 26, 1804, (2 Stat. 277), provided

"that the powers vested by law in the Surveyor General shall extend over all the public lands of the United States to which the Indian title has been or shall hereafter be extinguished, north of the River Ohio and east of the River Mississippi, and it shall be the duty of the said Surveyor General to cause the said lands to be surveyed."

Act of June 12, 1840, provided

"that it shall be the duty of the Secretary of the Treasury to take all necessary measures for the completion of the surveys in the several districts for which surveyors general have been, or may be, appointed, at the earliest periods compatible with the purposes contemplated by law." (5 Stat. 384.)

Act of 1st of March, 1847, creating land district of the Upper Peninsula of Michigan, provides that

"all the lands embraced in said district, not reported as aforesaid, shall be sold in the same manner as other lands under the laws now in force for the sale of public lands, excepting and reserving from such sales, Section 16 in each township for the use of the schools, and such reservations as the President shall deem necessary for public uses." (9 Stat. 146, Sec. 2.)

Under such legislation, was it not the duty of the Commissioner of the General Land Office, or Surveyor General, to cause a survey to be made, as early as practicable, of the Indian Reserve, if the Surveyor General did not understand that the same had been surveyed by Mullett in 1845? In other words, was an act of Congress necessary for a special survey of an Indian Reservation of 36.50 acres, the outer boundaries of which had been run and reported by the deputy, and approved by the Surveyor General and the General Land Office?

Whelpley was surveying the village of Sault Ste. Marie and certainly had authority to survey all except the Military Reservation, and the Indian Reserve, and the Indian Agency Reserve. The Indian Reserve, so-called, was simply incumbered by an Indian right of occupancy for purposes of encampment convenient to fishing grounds. A treaty had been made releasing the land from this incumbrance, and there only remained ratification and proclamation at the time of Whelpley's Survey of the Indian Reserve. (11 Stat. 631-2.)

Unauthorized Survey is Validated by Subsequent Authorization. (9.)

In Doswell vs. De La Lanza, Mr. Justice McLean said,

"If the surveys were void when made west of the Nueces as being without the limits of San Patricio County, they were made valid by the subsequent approval of the county surveyor after the county limits were extended west of that river." (33).

In Spencer vs. Lapsley, Mr. Justice Campbell said,

"It was a common practice in Texas for empresarios and

NOTE 9—Taylor vs. Brown, 9 U. S., 234, 245-6 (1809);
Doswell vs. De La Lanza, 61 U. S., 29, 33 (1857);
Spencer vs. Lapsley, 61 U. S., 264 (1857);
Boardman vs. Reed, 31 U. S., 328, 336 (1832);
Stringer vs. Youngs, 28 U. S., 320, 338-9-0-1 (1830);
Jones vs. Menard, 1 Tex. 771, 789 (1846-7);
Howard vs. Perry, 7 Tex. 259, 266-7 (1851).

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others to have their surveys completed in anticipation of the arrival of colonists or the measurements requisite for the procurement of the final title. The return of such surveys by a surveyor and their recognition by the commissioner or alcalde was treated as a substantial compliance with the law. A surveyor might adopt the surveys of other persons." (271-2.)

In this case there was a dissenting opinion, but the same does not question the decision in Doswell vs. De La Lanza.

In Stringer vs. Young, Mr. Chief Justice Marshall said,

"This also appears to have been substantially decided in the case of Taylor vs. Brown. In that case, Taylor's survey was made by Hancock Taylor, who was killed by Indians, so that he never returned the plat and certificate of survey to William Preston, the principal surveyor, as was required by law. His field-notes, however, were brought to the principal surveyor, who made out a plat and certificate of survey from them. To the objection, that the plat and certificate not having been returned to the office, the survey was not completed, the court answered, 'this survey, then, is, in law language, made by William Preston. It is confirmed as a survey made by him; the law recognizes it as his survey. Assuredly then, his certificate may authenticate it.' " (340-1.)

Did Whelpley in Fact Survey?

Neither the verified field notes of Whelpley found in State Land Office, nor the record of same in General Land Office, show any field notes of Whelpley's Survey of the parcels of the Indian Reserve. (Rec. 371.) But there cannot be any doubt but that he did actually survey these parcels.

(a) His map (Comp. Ex. "E," Rec. 163) shows that he did. The map shows his field notes in full.

O'Hare, head of a tracing division of General Land Office, laid upon a map Whelpley's meander as per his field notes on his map, and Mullett's meander as per his field notes (Defts. Ex. 37, Rec. 214.) The substantial coincidence of these lines could only arise from two actual surveys, or from fraud on

Whelpley's part, committed by laying upon a map the meander lines of Mullett's survey, and then, by calculation, determining the relation of meander lines of an imaginary survey to the same. Such a work would have taken more time than an actual survey.

These meander lines are practically coincident, except at a point where a change of wind might make all the difference shown by the two lines. (Rec. 295-6.) At this point the meander lines are about fifty feet apart, (Map, Comp. Ex. 37, Rec. 215), and this difference would be accounted for by about one foot rise or fall in the water. (Rec. 295-6.) Such rise or fall would result from change of medium to strong wind. (Rec. 295-6.)

(b) Whelpley is dead. (Rec. 327.) So are all his assistants except Luke Durocher. (Rec. 259-0.)

Durocher testifies to the actual survey by Whelpley of the Indian Reserve. (Rec. 259.)

Paper Pamphlets.

(c) In the State Land Office in Michigan, with Whelpley's map and his verified field notes, are two **paper pamphlets** containing field notes of practically his entire survey, including the Indian Reserve in two parts. (Rec. 344-5. Rec. 351 to 360. Rec. 542-3, 557-8. Ex. 46 to 51. Rec. 549 to 552. Rec. 727.)

Photographic copies of these paper pamphlets constitute pages 351 to 360 inclusive of the Record. They are indisputably in Whelpley's hand writing, the same hand writing that appears in the verified notes. (Vant Hoff, Rec. 345-6. Photos, Rec. 351 to 360, and Rec. 533 to 559. Cairnes, Rec. 537. Ripley, U. S. Engr., Rec. 727-735.) They appear to have been copies from Whelpley's original notes of his survey made in the field. (Hodgman, Rec. 717. Ripley, U. S. Eng'h., Rec. 734-5, 727.)

These paper pamphlets appear to be a journal of his field notes. The evidence of every expert surveyor called (and they were all called by the complainant(shows that they are an earlier draft of the notes made in the field than are the verified field notes. (Skeels, Rec. 704 to 711. Hodgman, Rec. 712 to 717. Ripley, U. S. Eng'r in charge, Rec. 719, 727-28, 734.)

They contain notes of every private claim shown on the Whelpley map and almost without exception correspond exactly with the field notes on that map. (Compare photographic copies, Record 351 to 360, inclusive with verified field notes. Rec. 370 to 533.)

The verified field notes are a transcript from some earlier notes. (Ripley, U. S. Eng'r., Rec. 734-5.) Such must be the fact from the nature of the business.

They are arranged, not in the order of the survey as actually made, but in a convenient order for use in connection with the map. (Ripley, U. S. Eng'r., Rec. 727-8, 734-5. Compare field notes with map.)

The paper pamphlets appear to contain field notes of the survey in the order in which the work was done in the field, (Ripley, U. S. Eng'r., Rec. 734) and the experts agree that the notes in these paper pamphlets were probably made by Whelpley from the original notes in the field. (Ripley, U. S. Eng'r., Rec. 734-5. Hodgman, Rec. 715, 717. Ripley, 727-8.)

That his object in making them was for convenience in making his map. (Hodgman, Rec. 713, 718.)

There can be no doubt that Whelpley actually surveyed the Indian Reserve, and the only explanation of the failure of the verified field notes to show the survey of the Indian Reserve is that, in transcribing from the original notes, or the sheets photographed, they were, by accident, omitted.

The so-called paper pamphlets are found in the proper office, to-wit: the State Land Office of Michigan. (Rec. 344-5, 557-8, 549-552.)

That they are not marked "Filed" is immaterial. (10.) Neither are the verified field notes. (Rec. 533 to 559.)

In Wright vs. Roseberry, Mr. Justice Field said: "Objection was taken to a copy of this map because the one deposited in the office of the Surveyor General of the state was not marked as filed. If such was the case, the omission was one of that officer, and could not affect the validity of the map as evidence." (Rec. 514.)

NOTE 10—Wright vs. Roseberry, 121 U. S., 488 (1887); Beebe vs. Morrell, 76 Mich., 114 at 120 (1889).

(d) It is the survey and not the filing or record or verification thereof which avails. (11.)

Survey Not Open to Collateral Attack. (12.)

In Russell vs. Land Grant Co., Mr. Justice Brewer said,

"A survey made by the proper officers of the United States, and confirmed by the Land Department, is not open to challenge by any collateral attack in the courts. By Section 453, Revised Statutes, full jurisdiction over the survey and sale of the public lands of the United States, and also in respect to private claims of land, is vested in the Commissioner of the General Land Office, subject to the direction of the Secretary of the Interior." (256.)

In Cragin vs. Powell, Mr. Justice Lamar said,

"The power to make and correct surveys of the public lands belongs to the political department of the government, and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or oginal power to make similar corrections, if not an elementary principle of our land law, is settled by such

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NOTE 11—Stringer vs. Youngs, 28 U. S., 320, 339 (1830);
Taylor vs. Brown, 9 U. S., 234, 242 (1809).

NOTE 12—Russell vs. Land Grant Co., 158 U. S., 253 (1895);
Cragin vs. Powell, 128 U. S., 691 (1888);
Knight vs. U. S. L. A., 142 U. S., 161 (1891);
Stoneroad vs. Stoneroad, 158 U. S., 240, 248-9 (1895);
Burfenning vs. Railway, 163 U. S., 321, 323 (1896);
Gardner vs. Bonestell, 180 U. S., 362, 369 (1901);
Corporation vs. Gibbon, 158 U. S., 155, 176 (1895);
Steele vs. Smelting Co., 106 U. S., 447, 450-1 (1882).

a mass of decisions of this court that its mere statement is sufficient." (698-9.)

In Knight vs. U. S. Land Associations, Mr. Justice Lamar again says,

"It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the Courts except by a direct proceeding." (176.)

Respecting the sufficiency of Mullett's survey as a basis of sale, the Circuit Court of Appeals expressed no opinion. After considering the facts relating to it, Judge Severens said,

"We postpone for the moment the consideration of the question of the sufficiency of the Mullett survey to justify a sale or other disposition of the land without a further survey." (152 Fed. Rep. 32.) (Rec. 823.)

Thereafter he considers the Whelpley survey and says,

"The Whelpley survey was adopted by the department, and has since been acted upon as the final public survey. We may here conclude what we propose to say about the objection that the Chandler patent is void because there then had never been any survey of the land. It is true there has never been any survey of the land upon the lines of sections and subdivisions as when such method of surveying is practicable. There are many instances where the public lands, if sold at all, must be surveyed in a different way from the more common method employed in a wide expanse of territory. The object of survey is as fully attained. If the land was at the time subject to the control and disposition of the department, we cannot think that its disposal upon the existing surveys could be assailed, certainly not in this collateral way." (152 Fed. Rep. 32-3.) (Rec. 823.)

THIRD. Chandler, **patentee, was not in employ of United States** at time of location, May 17, 1881. (Rec. 238, 248-9, 270.)

CHANDLER PATENT NOT VOID.

Because,

FOURTH. Same is based on location of **Porterfield Scrip** on land within the limits of an **incorporated village.**

The act for the relief of the legal representatives of Charles Porterfield required the Sec. of the Int. to issue to Porterfield's executors "a number of warrants equal to six thousand one hundred and thirty-three acres of land, according to the usual subdivisions of the public surveys, in quantities not less than forty acres; to be by them located on any of the public lands which have been or may be surveyed, and which have not been otherwise appropriated at the time of such location, within any of the States or Territories of the United States where the minimum price for the same shall not exceed the sum of one dollar and twenty-five cents per acre; to be selected and located in conformity with the legal subdivisions of such surveys." (12 Stat. 836.)

The Department of the Interior has uniformly held that this scrip can be located on offered and unoffered land within the limits of an incorporated village. (13.)

In McChesney vs. Aberdeen, Secretary Smith said:

"It is the ruling of the Department that the mere fact that a tract of government land has been included within the corporate limits of a city or town, does not prevent entry of the same under the general land laws, provided that said tract of land cannot be entered as a townsite by the authorities of said town or city. Harper vs. Grand Junction (on review) (16 L. D., 127)."

NOTE 13—Williams vs. Brown, 1 Hill's Leading Cases, 74;
Lewis vs. Seattle, 1 Dec. of Dept. of Int., Pub. Lands, p. 497 (1881);
Citing case of Reed (A. D. 1864), 1 Hill's Leading Cases, p. 74;
Haper vs. Grand Junction, 16 Dec. of Dept. of Int., Pub. Lands, p. 127 (1893);
McChesney vs. Aberdeen, 16 Dec. of Dept. of Int., Pub. Lands, p. 397 (1893);
Application of John Torrent (Defts. Ex. 10, Rec. 323).

Lands Not Offered.

It is competent to locate Porterfield Scrip on unoffered as well as offered lands. (13a.) See also attached to the scrip on which Chandler located this land, note saying, "This warrant may be located upon unoffered lands." (Rec. 166.)

NOTE 13a—Bovard vs. Bunn, No. 634 Copps Land Laws, 803;
Opin. Comr. G. L. O., 28th June, 1871;
Opin. Atty Gen., Vol. 2, p. 506;
Opin. Atty Gen., Vol. 3, p. 382;
Byron Reed, Hill's Leading Cases, Vol. 1, p. 74;
Wm. P. Brown, Hill's Leading Cases, Vol. 1, p. 45;
Lewis vs. Seattle, 1 Land Dec., 397;
Harper vs. Grand Junction, 16 Land Dec., 127;
McChesney vs. Aberdeen, 16 Land Dec., 127;
Chandler vs. Sault Ste. Marie, 10 Copps Land Owner, 98.

ESTOPPEL

III.

United States is estopped to claim invalidity of the Chandler Patent, because of

(a) The **decision of the Secretary of the Interior** approving Chandler's application and acquiescence in such decision. (14.)

Such application was allowed after two and a half years contention, including four hearings, against opposition of Village of Sault Ste. Marie, Comr. of Indian Affairs and War Department.

For many years there have been dealings between appellant and respondent, all of which have proceeded upon the basis that respondent was owner of the mainland under the patent. (Rec. 192-3-4, 285-6, 343, 571-2.)

Such allowance pre-supposes that the land was not under reservation and that it was surveyed. That it was surveyed is expressly found by the Secretary. (Rec. 176.)

This decision has been acquiesced in by the United States for over twenty years—from June 8, 1883, to September 1, 1903—and is still acquiesced in except as the question is raised herein by the attorney of the Michigan Lake Superior Power Company.

In Ballance vs. Forsyth, Mr. Justice Campbell said,

"It is the settled doctrine of this Court that in the location and survey of claims arising under acts of Congress like those of May, 1820, and March, 1823, the Executive Department has, in general, exclusive jurisdiction, and that all questions arising upon their location and survey are administrative in their nature and must be disposed of in the Land Office." (185.)

Illinois Steel Company vs. Budziscz involved the validity of a patent challenged on account of an outstanding Indian right. Therein Judge Seaman said,

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NOTE 14—Ballance vs. Forsyth, 65 U. S., 183, 185 (1860);
Ill. Steel Co. vs. Budzisz, 82 Fed., 160, 161 (1897);
U. S. vs. Cal. Land Co., 148 U. S., 31, 43 (1893);
Leavenworth vs. U. S., 92 U. S., 733 (1875).

All questions as to entry and right to patent were then determinable by that tribunal, and the patents were not void, although they may have been voidable at the proper instance." (161.)

In U. S. vs. Cal. Land Co., 148 U. S., 31 at 43, Mr. Justice Brewer said, "Now it is familiar law that when jurisdiction is delegated to any officer or tribunal his or its determination is conclusive."

A disregard of this decision of the Secretary of the Interior, and of the rights which have grown up under the same, would justify the language of Mr. Justice Field in a dissenting opinion in Leavenworth vs. U. S., wherein he said,

"The government of the United States, through one set of its officers, after mature deliberation and argument of counsel, has issued its certificates or lists, that the lands in controversy were covered by the grant, and has thus encouraged the expenditure of millions of money in the construction of a public highway, by which the wilderness has been opened to civilization and settlement; and then, on the other hand, after the work has been done and the money expended, has, with another set of officers and all the machinery of the judiciary, attempted to render, and has succeeded in rendering, utterly worthless the titles it aided to create and put forth upon the world. Such proceedings are not calculated, in my judgment, to enhance our ideas of the wisdom with which the law is administered, or of the justice of the government." (759.)

We may add that this is attempted, in this case, at the beck, and in the interest, of a private corporation.

Scant Equity.

(b) The complainant, the sovereign, seeks the aid of a court of equity on ground of alleged technical invalidity of its patent. The attack is made more than twenty years after the location was allowed by the Secretary of the Interior on second hearing on appeal, which was on June 8, 1883. (Rec. 176.) The patent issued December 15, 1883 (Rec. 179-80), nearly twenty years before the bill was filed, which was on October 26, 1903 (Rec. 18).

ESTOPPEL.

Location filed with, and rejected by, Reg. and Rec., May 17, 1881 (Rec. 169-70). Appealed to G. L. O. Allowance opposed before Comr. by village of Sault Ste. Marie, by Comr. Indian Affairs and by War Dept. (Rec. 171.) Location allowed by Comr. G. L. O. October 13, 1881 (Rec. 171-2). Appealed to Sec. of Int. Decision by Sec. of Int. reversing G. L. O. and disallowing location, January 31, 1883 (Rec. 173-4). Motion for rehearing. Sec. of Int. recalls decision disallowing and confirms allowance of location by Comr. G. L. O. June 8, 1883 (Rec. 176-7-8).

Judge Severens said,

"It does not appear that the particular objection now made was presented to the Commissioner. But the matter of the reservations in the locality, including the land applied for, must have been under his observation; and the issuance of the patent is at least prima facie evidence that no valid objection to its issuance was deemed to exist. The Land Office then had, and has continued to have, in its possession the same data for raising the question of the validity of the patent, that are made the basis for the contention now made. Upon the faith of the grant, the patentee and his grantee have made permanent improvements upon the land, costing from $135,000 to $150,000." (152 Fed. Rep. 25 at 40.) (Rec. 832.)

How does such a case appeal to the conscience of this court? (15.)

In Mich. Pipe Co. vs. Freemont, Judge Sanborn said,

"A suit in equity is an appeal for relief to the moral sense of the chancellor. A court of equity is the forum of conscience. Nothing but good faith, the obligations of duty and reasonable diligence will move it to action." (287.)

NOTE 15—Pipe Co. vs. Freemont, 111 Fed. Rep., 284, 287 (1901);
McCabe vs. Mathews, 155 U. S., 550 (1895);
Pope Co. vs. Gormully, 144 U. S., 224, 236 (1892);
Nickerson vs. Nickerson, 127 U. S., 668, 676 (1888);
May vs. Schofield, 6 D. C., 235, 239 (1867);
Ins. Co. vs. Brown, 30 N. J. Eq., 193 (1878).

In McCabe vs. Mathews, Mr. Justice Brewer said,

"A decree for the specific performance of a contract for the sale of real estate does not come as a matter of course, but is granted or withheld according as equity and justice seem to demand in view of all circumstances of the case." (553.)

In Pope Co. vs. Gormully, Mr. Justice Brown said,

"To stay the arm of a court of equity from enforcing a contract, it is by no means necessary to prove that it is invalid; from time to time immemorial it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts; and to turn the party claiming the benefit of such contract over to a court of law." (236.)

Ordinarily estoppel cannot be urged against the United States, the sovereign, when the suit is brought and prosecuted in its interest and to secure to it any governmental or property rights. And it is herein claimed that the "defenses of stale claim and laches cannot be set up as a bar" against the sovereign. Under some circumstances, this is true, but not in such cases as this. Herein the general equitable rule applies. (16.)

In Woodruff vs. Trapnell, Mr. Justice McLean said,

"We naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice, and a higher morality than belong to the ordinary transactions of individuals." (207.)

NOTE 16—Woodruff vs. Trapnall, 51 U. S., 190 (1850);
United States vs. M. R. Co., 54 Fed. 807, 811-2 (1892);
Indiana vs. Milk, 11 Fed., 389, 397 (1882);
People vs. Michigan C. R. Co., 145 Mich., 140 (1906);
U. S. vs Arredondo, 31 U. S., 691, 712 (1832);
U. S. vs. Walker, 139 Fed., 409, 412 (1905);
U. S. vs. Ch. D. W. P. Co., 152 Fed. 25 (1907).

This is quoted with approval in United States vs. M. R. Co. (811-2.)

In Indiana vs. Milk, Judge Gresham said,

"Resolute good faith should characterize the conduct of States in their dealings with individuals, and there is no reason in morals or law that will exempt them from the doctrine of estoppel." (397.)

In People vs. Michigan Central Railroad Company, Judge Grant said,

"When the state enters into purely contractual relations with its citizens, it should be bound by the same rules of construction that bind its citizens with whom it contracts. * * * * The state, of all parties contracting, should deal fairly and honestly with its citizens. (160.)

In United States vs. Arredondo, Mr. Justice Baldwin said,

"By consenting to be sued and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide as between man and man on the same subject matter." (712.)

In United States vs. Walker, Judge Jones said,

"When the sovereign sues, he brings with him no privileges which exempt him from the common fare of suitors." (412.)

Herein Justice Severens said,

"It derogates from the dignity and character of the government to suppose that, formed as it is, to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another." (152 Fed. Rep. 25 at 41.) (Rec. 832.)

(c) There has been **no offer to return** Chandler's **Porterfield Scrip.**

All rules of law and of morals require a grantor, before disaffirming or rescinding a grant, to return the consideration. The United States retains the Porterfield Scrip. Evidently it does not intend to disaffirm, or rescind, this patent. The attack on same herein is unauthorized.

LIMITATION.

Why is not any attack on the patent by the United States now barred by limitation? Act of Congress, chapter 559, approved March 3, 1891, volume 26, Stats. at Large, page 1093, provides "that suits by the United States to vacate and annul any patent heretofore issued, shall only be brought within five years from the passage of this act."

The patent was issued Dec. 15, 1883. (Comp. Sec. 14, p. 25). This action was not commenced until nearly twenty years thereafter.

It seems to us that this statute bars the attack of the United States upon the Chandler patent on all grounds except, perhaps, one. The spirit of the statute is approved and favored by this Court. Respecting it, Mr. Justice Brewer said,

"Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States, and open to sale and conveyance through the land department. * * * *

It is true that these appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold titles arising under certification, or patent, by providing that, after a certain time, the Government, the grantor therein, should not be heard to question them." U. S. vs. Railroad, 165 U. S., 463 at 476.

The modern doctrine is that statutes of limitation, negative or positive in form, give, not simply immunity from action, but, title to the property adversely possessed. (17.)

NOTE 17—Campbell vs. Holt, 115 U. S., 620, 622-3 (1885);
Leffingwell vs. Warren, 67 U. S., 599, 605 (1862);
Bickner vs. Comstock, 113 U. S., 149, 152 (1885);
Sharon vs. Tucker, 144 U. S., 533, 543-4 (1892);
Shelby vs. Guy, 24 U. S., 361, 370-1-2 (1826);
Dickerson vs. Colgrove, 100 U. S., 578, 583 (1879);
Chapin vs. Freeland, 142 Mass., 383 (1886);
Preston vs. Briggs, 16 Vt., 124, 130 (1844);
Eingartner vs. Ill. Steel Co., 103 Wis., 372, 375 (1899);
Nelson vs. Jacob, 99 Wis., 547 (1898).

Counsel claim that the patent does not draw to itself the protection of this statute because same is void, being of land in reservation.

Counsel cite one decision of this Court somewhat to the point, wherein Chief Justice Marshall said,

"The conveyance being made by a person having no authority to make it, is of no validity, and cannot connect the purchaser with the original grant." (Powell vs. Harman, 27 U. S., 241.)

This decision went in line with, and affirmance of, the then supposed doctrine of the Supreme Court of the state of Tennessee. This doctrine having been disaffirmed by the Supreme Court of the state of Tennessee, this case, Powell vs. Harman, was twice expressly overruled on this point by this Court. (18.)

In Toll vs. Wright, Chief Justice Cooley said of Patton vs. Easton and of Powell vs. Harman,

"They were both overruled in Green vs. Neal's Lessee, 6 Pet. 291, on the authority of a later state decision. They may consequently be dismissed from consideration as being without weight as precedents." (98-9.)

Divers States have enacted divers limitations to the attack upon tax deeds. Under such statutes, the Courts have held that papers purporting to be tax deeds, describing lands not subject to taxation for the supposed taxes, did not draw to them the protection of the statute. But the reasons applying to an attack by the United States upon a so-called patent of land under Executive Reservation, seem to us to be quite different from the reasons applying to an attack by a land owner upon a so-called tax deed upon his land, based on a tax to which the land was never liable.

Is there any logical reason why the limitation should not run against an attack upon the patent on account that the land was under Executive Reservation? In law, the reservation

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NOTE 18—Green vs. Neal, 31 U. S., 291, 301 (1832);
Gelpcke vs. Dubuque, 68 U. S., 175, 212-3 (1863);
Toll vs. Wright, 37 Mich., 93, 98-9 (1877).

causes an artificial distinction between the land under reservation and other lands of the same nature, which artificial distinction is subject to removal at any time, for any reason, by the same power that made it, and that makes the patent and that enacts the limitation. In the instant case, all departments of the government supposed this distinction to have been annulled, the reservation to have been withdrawn, and the lands to have been restored to the body of "public lands."

If the thing patented were in its essence, governmental property (jus publicum), necessarily held in trust for governmental purposes, then the so-called patent would be **ultra vires**, no patent. It would not then draw to itself the protection of the statute. But the fact that this parcel of land may have been temporarily under reservation, and hence, by reason of such temporary reservation not "open to sale and conveyance," does not seem to us to emasculate the patent.

The government, the Executive on recommendation of the Land Department, declared the reservation. The government, the Executive and the Land Department declared the reservation released and made the patent. Does not the statute now forbid the government, the Department of Justice, to say that the other departments were in error respecting the release?

Upon this point, Judge Severens said,

"Counsel for complainant raise two objections to the application of this statute. One is that this suit is not a suit to annul the Chandler patent, but only to maintain the title to these islands and that they attack the validity of the patent only for the purpose of maintaining the title to the islands. This amounts to a contention that although the patent could not be attacked directly, after the time prescribed, yet it may be done indirectly, for the purpose of controlling an incident, the right to which flows from the patent itself. The proposition is too plainly untenable for argument. But we add that the general rule is that possession of land under a claim of title for the period prescribed by a statute of limitation vests the title in him for whose protection the statute creates the limitation; and if, as we think, possession is not necessary under this statute, the lapse of time is of itself sufficient to effect the same result. The right of action of the United States, assum-

ing it to have had any, was complete at the date of the passage of the Act and the lapse of five years without action to annul the grant resulted in the confirmation of it.

The other objection to the application of this statute is that, if as contended, the Chandler patent is absolutely void, the statute cannot apply 'because,' quoting from the brief, 'in legal effect no such patent ever existed. Statutes of limitation may protect a voidable title from any question as to its validity, but no statute of limitations can operate upon a thing that never existed.' This statement of statutory limitations is open to criticism. But it is sufficient now to say that the statute in question is general and contains in itself no exception. When it speaks of vacating or annuling patents, of course it means the grants of title which the patents purport to make, and which the United States had lawful right to make.'' (152 Fed. 25 at 29.) (Rec. 819, 820.)

IV.

ISLANDS DID PASS BY PATENT OF MAINLAND.

This seems to us to be the only point properly presented for consideration. So Judge Wanty held.

On this point, Judge Severens said,

"We are much impressed by the contention of the appellee that the court below was right in holding, as it did, that upon this bill the question of the validity of Chandler patent is not a legitimate subject of inquiry. It is not a direct attack. There is no prayer that the patent be declared void." (152 Fed. Rep. 25 at 30.) (Rec. 821.)

Thereafter Judge Severens discusses the law and facts relating to reservation and survey and proceeds thus,

"The Chandler tract was therefore open to the location of the scrip, and had been adequately surveyed. The location of the scrip was permissible, and the patent was and is valid.

We come then to the question which is of more general interest to the United States, and the one which constitutes the direct object of the bill. And this is whether the ownership of the mainland carries with it the title to the islands lying between it and the thread of the stream." (152 Fed. Rep. 25 at 36.) (Rec. 827.)

DESCRIPTION OF ISLANDS.

The islands in question are simply low piles of loose boulders and broken stone left in the rapids, or sault, of the river, projecting but a few feet above the surface of the water, with trees and bushes growing between the boulders and loose stone. (Comp. Rec. 2, Ripley, Rec. 234-5, 244-5, 730-1. Photographs, Rec. 679 to 681.)

They are cut by cross currents into many islands. (Ripley, Rec. 244-5, 730-1, Kingan, Rec. 289-90.)

Judge Wanty, who knew them well, described them as "about an acre and a half of rock." (Rec. 45.)

There is no **navigation** of the river at this point, except by floating of forest products down stream, and the shooting of the rapids in canoes by tourists. Navigation past the place on the islands is by slack water through the canal.

The only practicable way of running logs over the rapids is to let them loose above the rapids, and boom them below. (Kingan, Rec. 305. Ripley, Rec. 736.) Running rafts down the falls was discontinued in 1885 or 1886. (Ripley, Rec. 736.)

Canoes go up by poling inside or outside of Island No. 2. Those going inside of Island No. 2 go out into the main stream between Islands 1 and 2, for the most part. Some may possibly go up inside of Island No. 1. (Kingan, Rec. 302.)

The combined area of the islands is less than an acre and a half. (Comp. Par. II, Rec. 1.) They are distant from the south shore about one-tenth of the distance from south to north bank of the river (Rec. 265), and about one-fifth of the distance from south shore to the international line. (Comp. Ex. "A" 5, Maps 1 and 2.)

At the islands, the River is about four thousand feet wide, including islands. There are large islands on the Canadian or Ontario side, and small islands (including 1 and 2) on the American or Michigan side. The international boundary is midway between the north and south shores, and quite close to the outer edge of the large islands on the Canadian side. (Comp. Ex. 5. Maps Nos. 1 and 2, P. 7.)

VALUE OF ISLANDS.

Judge Wanty said of them,

"Those insignificant islands whose only value to the complainant, if it does not own the upland, seems to lie in their position to form the subject matter of a cause for the determination of the question for the adjudication of which this suit was authorized to be instituted in the name of the United States." (Rec. 46.)

Comparing the value of these islands with the value of the 9.10¾ acres of land covered by the patent, he says,

"That shore land was of large value compared with these two insignificant islands."

"It is so much larger that these two islands sink into absolute insignificance." (Rec. 67.)

Stradley, the only witness called by the complainant to prove the value of the islands, testified that the value of the

two islands together was $50,000, though he would not put any separate value on either one alone. To the question,

"In what does their value consist?"

he answered,

"The strategic position with reference to water power." (Rec. 209.)

Q. "What do you think the man that bought it for $50,000 would want of them?"

A. "That would be his business." (Rec. 210.)

Mr. De Young, an engineer in the employ of the United States at the Soo, testified in behalf of the defendant that the islands were comparatively valueless for commercial purposes. (Rec. 268.)

On September 4, 1902, the Commissioner of the General Land Office sent to the Secretary of the Interior a statement made to him by the Chief of Engineers. It said, respecting the value of these islands,

"They are valuable mainly because of their partial control of water power privileges or rights in the rapids; such value being of less importance, however, to the United States than to others, because it can obtain all the water power it desires from its own canal." (Rec. 193.)

Mr. Chandler, substantially a defendant, testified,

Q. "What is the property value, in your judgment, of Islands one and two?"

A. "Considered as the islands themselves, practically nothing."

Q. "Considered with reference to other property?"

A. "Considered in relation to the improvement of the water powers by the riparian owner, they would be of considerable value, either to the owner for the further improvement of the water power, or against him, in restricting the development." (Rec. 273.)

The fall against the defendant's mainland above the head of Island No. 1 is about four feet. The fall against Island No. 1 is a little more than six inches. And the extreme length of Island No. 1 is one hundred and nine feet. The fall between the foot of Island No. 1 and the head of Island No. 2 is about four inches. And the distance with the stream is about seventy-three feet. The fall against Island No. 2 is about two feet

and ten inches (Rec. 264), and the distance about three hundred and forty-eight feet. (Rec. 266.) The fall below Island No. 2 is about one foot. De Young's Table of Observation. (Rec. 264-5-6.)

The islands have no relation to the improvement of the stream for navigation. (Rec. 266-7-8, 293, 296. All maps showing location.)

POSSESSION.

Respondent and its grantor, Chandler, patentee, were in possession of these islands from the issuing of the patent up to 1903. (Rec. 273-278, 283-284, 287, 294, 299-300, 305.)

In 1903, the appellant took, and the respondent yielded, such possession of them as to enable the United States to bring this suit. (Rec. 305.)

International Boundary.

In continuing the boundary under Article 6 of the Treaty of Ghent, Mr. Porter was the American Commissioner, and Mr. Barclay the English Commissioner.

"Mr. Barclay also contended * * * that a line equidistant from the main shores was the true middle intended by the treaties describing the boundary, and it was, he said, the line which has been adopted, not only under Article 6, but also, under Article 7, so far as the commissioners have been able to agree."

Moore's International Arbitrations, Vol. 1, p. 177.

H. Ex. Doc. 451, 25th Cong., 2nd Sess.

Mr. Porter claimed that "Owing to the irregular and awkward shape of the river where it embraces that island (St. George's Island) it was impossible to trace an equidistant line, but there was another middle line, ascertainable on strictly scientific principles, which would effect a more sensible and practicable division of the area than a zigzag equidistant line. This was a line from a point in the center of the river, immediately above where it branches in order to pass the island, to another point in its center immediately below where the two

branches again unite, drawn in such a manner as to divide the whole space by the shortest and more direct route compatible with the object, into two equal quantities. Such a line would throw nearly three-fourths of the island into the United States." (Ib. Vol. 1, pp. 178-9.)

Opinion of Commissioners Porter and Barclay respecting the line through the St. Mary's Rapids.

"That is to say, beginning at a point in the middle of the St. Mary's River, about 1 mile above the head of St. George's or Sugar Island, and running thence easterly through the middle of said river, passing between the groups of islands and rocks which lie on the north side and those which lie on the south side of the Sault Ste. Marie as exhibited on the maps; thence through the middle of said river between Points Iroquois and Gros Cap, which are situated on the opposite main shores at the head of the River St. Mary's and at the entrance into Lake Superior; thence by a straight line through Lake Superior * * * " (Ib. Vol. 1, p. 185.)

LANDS OMITTED FROM SURVEY.

When the United States survey purports to be completed at any place, and the surveyed lands are patented, no resurvey can be made except in case of omission through fraud or mistake. The title to omitted lands is in the patentee of adjoining parcels or in the state.

In considering this question, we find three classes of cases:

First. Where the lands omitted were islands.

Second. Where they were mainland.

Third. Where they were islands or mainland according to the stage of the water.

Each of the foregoing classes furnishes a great variety of facts and circumstances.

Little use can be made of one class in solution of cases of another class. But this general rule runs through all the cases: **when the United States survey purports to be completed** at any place, and the surveyed lands are patented, no re-survey can be made except in case of omission through fraud or mis-

take. With such exception, the title to omitted lands is in the patentee of the adjoining parcels, or in the State.

AS TO ISLANDS.

The almost universal rule is that **unsurveyed islands**, between the bank and the middle thread of the river, not omitted from survey by fraud or mistake, **pass with the mainland** to the riparian patentee. (19.)

In R. R. vs. Butler the survey referred to Low Willow

NOTE 19—U. S. vs. Stinson, 197 U. S., 200 (1905); (large island);
Whitaker vs. McBride, 197 U. S., 510, 514 (1905); (22 acre island);
Mitchell vs. Snale, 140 U. S., 406 (1891);
Railroad vs. Butler, 159 U. S., 87, 90, 95 (1895);
Butler vs. Railroad, 85 Mich., 255 (1891); (Low Willow Isle);
Chandos vs. Mack, 77 Wis., 573 (1890);
Granger vs. Avery, 64 Me., 292 (1874); (5 acre island in international river);
Pritchard vs. Middleton, 4 Ill., 510 (1842);
Church vs. Case, 122 Mich., 554 (1899); (18 acre island in lake not meandered);
McCullough vs. Wall, 4 S. C., 68, 82 (1850);
Gould on Waters, Sec. 77;
Railroad Co. vs. Railroad Co., 26 Minn., 31, 33 (1879);
Morgan vs. Reading, 11 Miss., 366 (1844);
Houck vs. Yates, 82 Ill., 179 (1876); (large island in Mississippi);
Franzini vs. Layland, 120 Wis., 72 (1903); (large island in Mississippi);
Webber vs. Axtell, 94 Minn., 375 (1905); (unsurveyed island in small lake).

Isle. Speaking of the decision of the Court below, Mr. Chief Justice Fuller said,

"The Court held that the well recognized rule in Michigan was * * * * that when the government has surveyed its lands along the bank of a river, and has sold and conveyed such lands by government subdivision, its patent conveys the title to all islands lying between the meander line and the middle thread of the river; unless previous to such patent it has surveyed such islands as governmental subdivisions or expressly reserves them when not surveyed." (91.)

Quoting from the Supreme Court of Michigan:

"In the present case there is no act on the part of the government showing any intention to reserve this land. The only inference that can be drawn from the facts is that the government agents, its surveyors, did not consider it of sufficient value to survey." (91-2.)

Quoting from Mitchell vs. Smale:

"Nor do we mean to say that, in granting lands bordering on a non-navigable lake or stream, the authorities might not formally by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective States of all swamp and overflowed lands therein, this cannot be done. In the present case it cannot be be seriously contended that any palpable mistake was made, or that any fraud was committed by the surveyor who made the survey of 1834-5." (94-5.)

Further:

"We have no doubt upon the evidence that the circumstances were such, at the time of the survey, as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate mistake or fraud, and the government has never taken any steps predicated on such a theory; and did not survey the so-called Island No. 5 until 25 years after the survey of 1831, and nearly 20 years after that of 1837." (95.)

In Weber vs. Axtell, Justice Lovely said,

"If the island between the shore and the center of the lake when the patent was first issued was unsurveyed, without any expressed intention on the part of the government to treat it

as a portion of its dominion, it would accrue to the plaintiff." (380.)

One reason for the rule that insignificant, unsurveyed, islands and tongues of land pass by patent of the adjacent uplands is the **economic one**. The ownership of such islands or tongues of land is practically valueless when separated from the ownership of the mainland, while same is often of great value if united with ownership of mainland. Such ownership, separate from the ownership of mainlands, is of such value, and such value only, as the value of the hay to the "dog in the manger." The instant case is an emphatic illustration of this reason for the rule. (See diagram II herein. Also Rec. 207, 210, 273.)

The entire value of the islands in controversy lies in the power the ownership thereof gives to interfere with, or aid in, the development of the hydraulic power by the riparian. (Rec. 46, 209-0, 268, 273, Diagram II.)

Diagram II shows how the power of the fall is wasted by separating the ownership of the islands and adjacent subaqueous lands, from that of the mainland and adjacent subaqueous lands.

The logical, underlying reason of this rule is that the title to unsurveyed islands goes with, and is part of, the subaqueous lands,—that the United States treats them as part of such subaqueous lands, and relinquishes to the State all proprietary interest therein, and the State in turn relinquishes them to the riparian. (20).

NOTE 20—Grand Rapids & Ind. R. R. Co. vs. Butler, 159 U. S., 87, 88 (1895);
Franzini vs. Layland, 120 Wis., 72, 81-2-3 (1903);
Webber vs. Axtell, 94 Minn., 375 (1905);
McCullough vs. Wall, 4 S. C., 68, 82 (1852);
Trustees vs. Dickinson, 63 Mass., 544-5, 548-9 (1852);
Deerfield vs. Arms, 34 Mass., 41 (1835).

Chandler Tract, inc

Scale of Whelpl

1 to 2112.

Distance from a to b is

" " b " c "

" " c " d "

" " d " e "

" " a " f "

W.

a

S 8°56W 8.09

54°32'E 100

S 77° 10'E

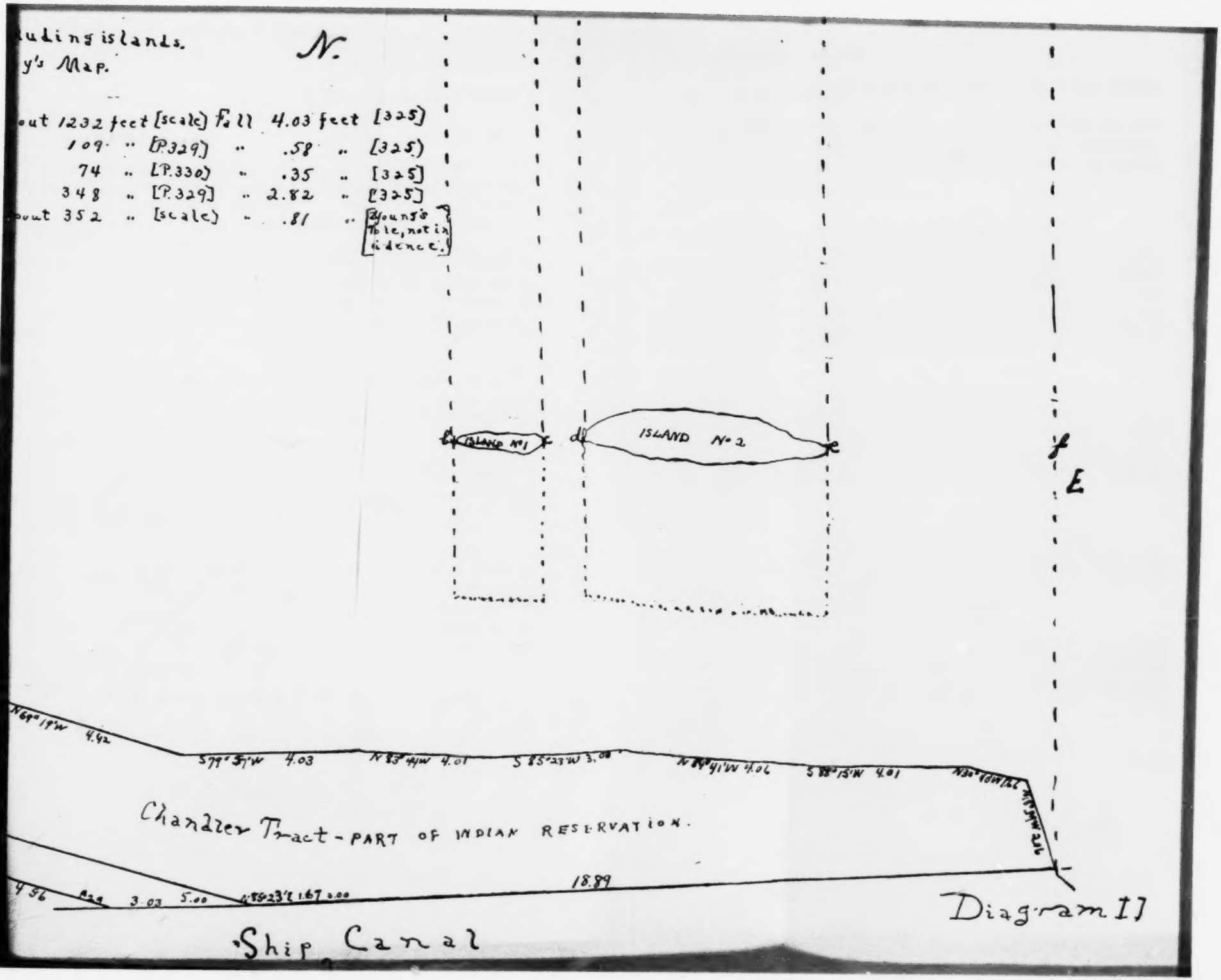
105

Portage Street

1500

160

9.65


uding islands.
y's Map.
N.
out 1232 feet [scale] Fall 4.03 feet [325]
109 " [P.329] " .58 " [325]
74 " [P.330] " .35 " [325]
348 " [P.329] " 2.82 " [325]
out 352 " [scale] " .81 " [Young's Table, not in evidence.]
ISLAND No 1
ISLAND No 2
E
N69°19'W 4.42
S79°31'W 4.03
N83°44'W 4.01
S85°23'W 3.08
N84°41'W 4.06
S88°15'W 4.01
N35°10'W 22
Chandler Tract - PART OF INDIAN RESERVATION.
18.89
4.56
3.03
5.00
S89°23'E 1.67 3.00
Ship Canal
Diagram I]

ISLANDS APPURTENANT

In Grand Rapids & Ind. R. R. Co. vs. Butler, Chief Justice Fuller said,

"Butler derived title under Lyon and Hastings, and claimed the land in dispute by virtue of riparian ownership, as taking, under the laws of Michigan, the bed of the stream to the thread thereof." (88.)

In Franzini vs. Layland, Justice Marshall said,

"As regards the original proprietor, the general government, the omission to take notice of the existence of an island in making the public land surveys, and approval of the survey by sovereign authority, evidences that the omitted land was intended to pass as an incident of the land it lies opposite of, and is appurtenant to it, if to any. (83.)

In Webber vs. Axtell, Justice Lovely said,

"As to this small island, at the time of the government survey and patent to plaintiff, the government of the United States made no claim, but treated it as the bed of the lake, which belonged to the state, subject to the rights of riparian owners." (381.)

In McCullough vs. Wall, Chancellor Dargan said,

"But islands in rivers, like rocks, (which are only small islands) fall under the same rules concerning ownership which apply to the soil covered by water." (82.)

The **proprietary right to the bed of the stream** being either in the riparian or in the state, this Court considers the **question of ownership by the riparian a question for each state to pass upon** through its legislature, or its Court of final resort. (21.)

NOTE 21—Hardin vs. Jordan, 140 U. S., 371 (1891);
Kaukauna W. P. Co. vs. G. B. & M. C. Co., 142 U. S., 254, 271-2 (1891);
Barney vs. Keokuk, 94 U. S., 324, 338 (1876);
Packer vs. Bird, 137 U. S., 661, 669-70 (1891);
St. Louis vs. Rutz 138 U. S., 226, 242 (1891);
Mitchell vs. Smale, 140 U. S., 406 (1891);
Railroad vs. Illinois, 146 U. S., 387, 435 (1892);
Shively vs. Bowlby, 152 U. S., 1, 45-6 (1894).

Hardin vs. Jordan involved riparian rights and a consideration of the settled doctrine of Supreme Court of Illinois. Therein Mr. Justice Bradley said,

"We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie. The next question for consideration, therefore, is what is the law of Illonois with regard to such grants." (384.)

Mr. Justice Brewer said,

"Beyond all dispute, the settled law of this Court established by repeated decisions is, that the question how far the title of a riparian owner extends is one of local law. For a determination of that question, the statutes of the state and the decisions of its highest Court, furnish the best and final authority." (402.)

Kaukauna W. P. Co. vs. G. B. & M. C. Co. involved the question of riparian ownership of subaqueous lands. Therein, Mr. Justice Brown said,

"It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the center or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels. * * * * With respect to such rights, we have held that the law of the State, as declared by the Supreme Court, is controlling as a rule of property." (271-2.)

Mr. Justice Shiras truly said in his dissenting opinion in Scranton vs. Wheeler,

"Riparian rights when recognized as existing by the laws of the State are a valuable property and the subject of compensation when taken for public use." (179 U. S., 141 at 178-9.)

This case related to St. Mary's River.

To now reverse the doctrine of the Michigan decisions

would be, as Mr. Justice Bradley said in Hardin vs. Jordan: "It is too much like judicial legislation. It is as much as to say, 'We think the common law might be improved and we will therefore improve it.'" (397.)

Michigan Rule.

In Michigan, the riparian, under patent of the United States, owns the bed of the river to the middle thread thereof. (22.)

In Grand Rapids vs. Butler, Chief Justice Fuller said,

"In Michigan the common law prevails, and the rule is sustained by an unbroken line of authorities that a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof." (93-4.)

Kemp vs. Stradley involved riparian lands on St. Mary's River. Justice Hooker commences his opinion thus:

"The complainant owning lands to the center of the Sault Ste. Marie River on both sides of a city street, built docks extending some distance into the stream in front of his entire premises." (676.)

NOTE 22—Ryan vs. Brown, 18 Mich., 196, 208-9-10 (1869);
Bay City Gas Light Company vs. Industrial Works, 28 Mich., 182 (1873);
Attorney General vs. Booming Co., 34 Mich., 463; (1876);
Backus vs. Detroit, 49 Mich., 110 (1882);
Turner vs. Holland, 65 Mich., 453 (1887);
Grand Rapids vs. Powers, 89 Mich., 94 (1891);
People vs. Silberwood, 110 Mich., 103, 106-7 (1896);
Brown vs. Parker, 127 Mich., 391, 392 (1901);
Grand Rapids R. R. vs. Butler, 159 U. S., 87 (1895);
Kemp vs. Stradley, 134 Mich., 676 (1903).

In connection with the Michigan cases, see Michigan Constitution of 1850, Article XX, Schedule Sec. 1,

"The common law and the statute law now in force * * * shall remain in force until they * * * are altered or repealed by the legislature." Compiled Laws Mich., V. 1, p. 129.

There are no two opinions respecting the common-law rule of ownership by riparian of subaqueous land on non-tidal rivers. A late and full exposition of the rule for states where the common law is adopted by statute, or constitution, is found in Kinkead vs. Turgeon, (Neb.) 109 N. W. R. 744, a well considered case involving an interstate river.

Counsel claim that No. 112 Public Acts of Michigan, 1895, "recognizes the public ownership of the lands under the Great Lakes and their connecting waters."

The language of the title may tend to support such inference. But the language of the act itself, not only does not support, but forbids the inference.

It sets apart and dedicates for shooting grounds,

"that part of Lake Erie lying adjacent to the surveyed lands of Monroe and Wayne Counties, and any submerged lands within the surveyed lines of said counties and connected with Lake Erie and Detroit River, **providing such surveyed lands are owned by the state of Michigan.**"

Attention has been called to section 6797, Compiled Laws of Michigan, authorizing such corporations as the M. L. S. P. Co.,

"Third, to divert into any canal * * waters from Lake Superior or St. Mary's River." This section 6797 is act No. 39, Laws of Michigan for 1883.

(a) Attorney General Oren gave the M. L. S. Po. Co. an opinion respecting this act, on March 14, 1899, wherein he said,

"You have also asked me for my opinion upon the question of whether your right to divert water into and through your canal would be subject to any other restriction than that

imposed by the navigation clause of the United States constitution. * * * It would be presumed that the grant that you received from the state through your corporate articles was a right that was subject to be exercised in such a way as not to interfere with any private ownership that might be had in the fall of water over the rapids. This, however, would be entirely a matter of adjustment between your company and the owners of riparian rights at the rapids." (Report of Atty. Gen. Mich., 1899, p. 110.)

(b) There are no limitations to the alleged legislative grant to divert the waters of St. Mary's River specified in the act. But we must of necessity imply three limitations—Canadian rights, navigation rights and riparian rights. The implication relating to the riparian rights is as imperative as that relating to the other rights.

(c) If the act be construed to declare title to the subaqueous lands to be in the State, then, as against a prior patentee, the act is void. When a rule of property has been established by judicial decision, it is not competent to the legislature to change the rule so as to affect past transactions. The legislature may say what the law shall be, but not what it was. (23.)

NOTE 23—Ogden vs. Blocklege, 5 U. S., 272 (1804);
Webster vs. Cooper, 55 U. S., 488 (1852);
U. S. vs. Klein, 80 U. S., 128 (1871);
Carlisle vs. U. S., 83 U. S., 147, 152 (1872);
Lambertson vs. Hogan, 2 Pa. St. 22, 25 (1845);
Forster vs. Forster, 129 Mass., 559 (1880);
Menges vs. Dentler, 33 Pa. St., 495, 498 (1859);
Haley vs. Philadelphia, 68 Pa. St., 45 (1871);
Orton vs. Noonan, 23 Wis., 102 (1868);
Nelson vs. Rountree, 23 Wis., 367 (1868);
Salters vs. Tobias, 3 Paige, 338 (1832);
Austin vs. Stevens, 24 Me., 520, 528-9-0 (1845);
Albertson vs. Landon, 42 Conn., 209, 211 (1875).

In Lambertson vs. Hogan, Justice Rogers said,

"Where it has been under judicial cognizance, no subsequent act of the legislature, whether it attempts the form of an explanaory act or whatever shape it may take * * * it cannot affect or change previous rights already fixed and settled. * * * It would be a libel on a co-ordinate branch of the government to suppose, without express words, they intended to commit so great and manifest injustice." (25.)

In Menges vs. Dentler, Chief Justice Lowrie said,

"The law which gives character to the case, and by which it is to be decided * * * is the law that is inherent in the case and constituted part of it when it arises as a complete transaction between the parties. If this law be changed or annulled the case is changed and justice denied and the due course of law violated." (498.)

In Haley vs. Philadelphia, Justice Sharswood said,

"An expository Act of Assembly is destitute of retroactive force because it is an act of judicial power, and is in controvention of the 9th section of the 9th article of the constitution which declares that no man can be deprived of his property 'unless by the judgment of his peers or the law of the land." (47.)

In U. S. vs. Klein, Mr. Chief Justice Chase said,

"Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have." (145.)

"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power." (147.)

In Orton vs. Noonan, Chief Justice Dixon said,

"The act of 1866 * * * has no influence upon the question, for the very plain reason that the legislature has, under the constitution, no power to declare a deed valid which by law was void as between the parties to it at the time of the passage of the act." (104.)

MICHIGAN RULE

In Nelson vs. Rountree, Chief Justice Dixon said,

"The affidavit for the order of publication, * * * was fatally defective within former decisions on that subject, and the court acquired no jurisdiction. * * * There being, therefore, no judgment in this action, the question arises as to the effect of the last clause of section 1, chapter 409, Laws of 1865, which declares that 'all orders of publication heretofore or hereafter made * * * shall be evidence of the existence of such facts.' * * * It is a proposition not to be discussed at this day, that the legislature has no such power; and the court below, therefore, erred in the instruction given to the jury upon this question." (369-70.)

In Salters vs. Tobias, Chancellor Walworth said,

"In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law." (344.)

(d) The right to the flow of the water in the stream, and to its use for power, does not depend on the title to the subaqueous lands, but on the title to the bank. It is purely a riparian right. (See Ante. p. 10, Note 1.)

Hence an attempt on the part of the legislature to authorize the diversion of the stream does not, in any way, imply an assertion of title to the subaqueous lands. Such title has no relation to the right to divert the water.

(e) How does the passage of such act, under which the M. L. S. P. Co. claims the right to divert the waters of the St. Mary's River from the defendant's riparian lands, comport with counsel's statement in complaint relative to treaty obligations of the United States respecting the waters of the St. Mary's river:—that the same "shall be free and open to the use of the citizens and subjects of both countries." (Rec. 4.)

Ordinarily we say that "Sauce for the goose is sauce for the gander." But treaty obligations seem to be made of different stuff. When our client claims title to a couple of piles

of rock in the rapids at St. Mary's, they seem to be very unyielding. But when the M. L. S. P. Co. seeks to divert the waters of the St. Mary's River from our riparian lands into a private canal for water power purposes, treaty obligations seem to yield in a very accommodating way. Then it seems that "sauce for geese ain't jest the juice for ganders."

Same Rule Applied to Interstate Rivers.

The riparian owns the subaqueous lands on the **Ohio River.** (24.)

The riparian owns the subaqueous lands on the **Mississippi River,** (25) which is, as said by Mr. Justice Bradley in Hardin vs. Jordan, "acknowledged to be one of the most important of navigable streams in the world." (387.)

NOTE 24—Berry vs. Snyder, 66 Ky., 266, 283 (1867);
Miller vs. Hepburn, 71 Ky., 326 (1871;
Stanberry vs. Mallory, 101 Ky., 49, 52 (1897);
Town of Rovenswood vs. Flemings, 22 W. Va., 52 (1883).

NOTE 25—Jones vs. Soulard, 65 U. S., 41 (1860);
St. Louis vs. Myers, 113 U. S., 566-7 (1885);
St. Louis vs. Rutz, 138 U. S., 226 (1890);
Morgan vs. Reading, 11 Miss., 366, 369 (1844);
Franzini vs. Layland, 120 Wis., 72, 81 (1903);
Middletown vs. Pritcherd, 4 Ill., 510 (1842);
Houck vs. Yates, 82 Ill., 179 (1878);
Braxon vs. Bressler, 64 Ill., 488 (1872);
Cobb vs. Lavalle, 89 Ill., 331 (1878);
Lavalle vs. Shobell, 89 Ill., 370 (1878);
Ice Co. vs. Shortell, 101 Ill., 46 (1881);
Brooklyn vs. Smith, 104 Ill., 429, 438 (1882);
Schools vs. Schroll, 120 Ill., 509, 518-19 (1887);
People vs. Board of Supervisors, 125 Ill., 9 (1888);
Chicago vs. Van Ingen, 152 Ill., 624 (1894);
Trustees vs. McClure, 167 Ill., 23 (1897;
Magnolia vs. Marshall, 39 Miss., 109; (1860).

INTERSTATE RULE

In Jones vs. Soulard, Mr. Justice Catron said,

"We think this is a general rule too well settled as part of American and English law of real property to be open to discussion, and the inquiry here is whether the rule applies to so great and public a water course as the Mississippi is at the city of St. Louis. * * * The doctrine that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark has no application in this case. Nor does the size of the river alter the rule. To hold that it did would be dangerous tampering with riparian rights involving litigation concerning the size of rivers as a matter of fact rather than proceeding on established principles of law." (65.)

In St. Louis vs. Rutz, Mr. Justice Blatchford said,

The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property which is governed by the local law of Illinois. * * * The Supreme Court of Illinois has established and steadily maintained, as a rule of property, that the fee of the riparian owner of lands in Illinois bordering on the Mississippi River extends to the middle line of the main channel of that river." (242.)

Same as to the **Chattahoochee River**. (26.)

Interstate rivers are **International** rivers.

NOTE 26—Young vs. Harrison, 6 Ga., 130 (1849);
Jones vs. Water Lot Co., 18 Ga., 539 (1855);
Moses vs. Eagle Mfg. Co., 62 Ga., 455 (1879);
Cook vs. Winter, 68 Ga., 259 (1881).

NOTE 27—Nebraska vs. Iowa, 143 U. S., 358, 361 (1892);
Indiana vs. Kentucky, 136 U. S., 479, 506 (1890);
Handley's Lessee vs. Anthony, 18 U. S., 374, 379 (1820);
Rhode Island vs. Massachusetts, 37 U. S., 657, 720 (1838);
Alabama vs. Georgia, 64 U. S., 505, 512-3-4 (1859);
Opinions of Attorneys General, Volume 8, 175-6-7.

In Nebraska vs. Iowa, Mr. Justice Brewer said,

"These propositions * * * are in like manner recognized where the boundaries between states or nations are by prescription or treaty formed in running water." (361.)

In Handley's Lessee vs. Anthony, Mr. Chief Justice Marshall said,

"When a great river is the boundary between two nations or states, if the original property is in neither and there be no convention respecting it, each holds to the middle of the stream." (379.)

In Rhode Island vs. Massachusetts, Mr. Justice Baldwin said,

"Before we can proceed in this cause, we must, therefore, inquire whether we can hear and determine the matters in controversy between the parties, who are two states of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes. So they have been considered by this Court, through a long series of years and cases, to the present term." (720.)

In Alabama vs. Georgia, Mr. Justice Wayne said:

"The contract of cession must be interpreted by the words of it, according to their received meaning and use in the language in which it is written, as that can be collected from judicial opinions concerning the rights of private persons upon rivers, and the writings of publicists in reference to the settlement of controversies between nations and States as to their ownership and jurisdiction on the soil of rivers within their banks and beds. Such authorities are to be found in cases in our own country, and in those of every nation in Europe." (512-3.)

"Chief Justice Marshall says the shore of a river borders on the water's edge; and the rule of law, as declared by the court in 5 Wheat., 379, is, that when a great river is a boundary between two nations or States, if the original property is not in either and there be no convention about it, each holds to the middle of the stream." (513-4.)

INTERNATIONAL RULE

Same Rule as to International Rivers. (28.)

Some of the Atlantic states have, by legislation "to benefit commerce," extended the rule of the riparian ownership of subaqueous land to tide waters, arms of the sea. (28a.)

NEW YORK RULE

The **Inferior Courts of New York** have held that the riparian owner on international rivers did not own the subaqueous lands. It appears to have been so held in Kingman vs. Sparrow (12 Barbour, 201 at 206). But in this case the question did not arise. (205-6.)

Later, this rule was distinctly held by Commissioners of Appraisal in State Reservation at Niagara, (16 Abbots New Cases, 159). Appeal was taken from this decision of the Commissioners to the Supreme Court at general term, and the decision of the Commissioners was sustained, (Id. 395, 37 Hun.

NOTE 28—Cases on **Detroit River.**
Lorman vs. Benson, 8 Mich., 18 (1860);
Rice vs. Ruddiman, 10 Mich., 125, 141-2 (1862);
Clark vs. Campau, 19 Mich., 325 (1869);
Backus vs. Detroit, 49 Mich., 110, 115 (1882);
Hall vs. Alford, 114 Mich., 165, 167 (1897);
Commissioners vs. Detroit, 117 Mich., 458, 462 (1898).
Cases on **St. Mary's River.**
Ryan vs. Brown, 18 Mich., 196, 207 (1860);
Scranton vs. Wheeler, 113 Mich., 565, 567 (1897);
Scranton vs. Wheeler, 179 U. S., 141, 163 (1900);
Sherwood vs. Land Commissioners, 113 Mich., 227-8 (1897);
Kemp vs. Stradley, 134 Mich., 676.
Cases on **St. Croix River.**
Granger vs. Avery, 64 Me., 292, 295 (1874).

NOTE 28a—Acts of Florida, 1856, p. 25;
Geiger vs. Filor, 8 Fla., 325, 339-0 (1859);
Chap. 9, Laws of Maryland, 1745;
Also Chap. 4, Laws of Maryland, 1773;
Hammonds vs. Inloes, 4 Md., 138 at 170 (1853).

437), on the ground that the Niagara River was a public river, navigable in fact, and an International boundary. The Court said at page 547 (37 Hun.),

"The line between the United States and Canada is located in the center of the Niagara River * * * and we think because it is navigable in fact, and constitutes the natural boundary between this and another country, is the reason why the proprietary right, from its margin to such boundary line, is in the State; and that the riparian owners have taken, by the grant referred to, only to the water's edge of the stream."

Nowhere in these cases is there given any reason why the riparian on an International river should not have the same proprietary interest in the subaqueous lands as the riparian on any other public or navigable river. The fact that it is an International river is stated as though it were a reason why there should be a difference. But we cannot see wherein this fact is a reason. Where the boundary between nations is upon land there seems to be no reason why the citizens of the respective nations shall not own the land to the boundary line. What different reason applies where the land is subaqueous, conditioned only that the State or nation has control of the waters for all public purposes?

The decisions of the New York Courts on the question of riparian ownership of subaqueous lands in the public and navigable rivers of the State seem to have been as shifting as the sands of the sea.

The earlier doctrine of the New York cases was that the riparian on small rivers did, but on great rivers did not, own the subaqueous lands. (29.) At the same time it was held

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NOTE 29—Palmer vs. Mulligan, 3 Caines, 308 (1805);
Canal Appraisers vs. People, 17 Wend., 572 (1836);
People vs. Tibbetts, 19 N. Y., 523, 528 (1859);
People vs. Canal Appraisers, 33 N. Y., 461 (1865);
Hooker vs. Cummings, 20 Johns., 90, 99 (1822);
Ex parte Jennings, 6 Cow., 518, 537 (1826);
Rogers vs. Jones, 1 Wend., 237, 255-6 (1828);
Com'rs vs. Kempshall, 26 Wend., 404 (1841);
Varick vs. Smith, 9 Paige, 547, 566-7 (1842);
Clinton vs. Myers, 46 N. Y., 511 (1871).

that the same reasoning as to riparian ownership of subaqueous lands did not apply to international rivers as to the other rivers of the state. (30.) Later it was held that the riparian owner did own subaqueous lands on the navigable rivers, small and large, of the state, but not upon the Hudson River and the Mohawk River and interstate rivers. (31.)

The case, Commissioners of State Reservation, would probably have been carried to a higher court, but for the reason that such appeal was forbidden by the statute providing for the condemnation proceedings. (37 Hun. 541.)

Respecting the position of the New York Courts, Justice Robertson said,

"After a long and varying conflict among her Courts and most eminent jurists, New York, which has decided both ways, seems at last, by its latest decisions, to have followed the common law, but with exceptions and qualifications which neutralize her authority; for her Courts have sustained, against riparian claims, grants of islands in, and beds under, some of her navigable rivers, and without dissent, have adjudged that riparian owners on the lakes, and even the Niagara River, where there is no tide-water, have no title beyond the banks." (Berry vs. Snyder, 66 Ky., 266 at 290-1.)

SUBSEQUENT SURVEYS.

Except in case of omission by accident or mistake, the United States has no authority to make surveys subsequent to

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NOTE 30—Canal Appraisers vs. People, 17 Wend., 572, 598, 623 (1836).

NOTE 31—Chenango Bridge Co. vs. Paige, 83 N. Y., 178, 184 (1880);
Smith vs. Rochester, 92 N. Y., 463, 479, 481-2-3 (1883).

patent of any land between the meandered line and the middle thread of the stream. (32.)

In R. R. Co. vs. Schurmeir, Mr. Justice Clifford said,

"Argument is scarcely necessary to show, in view of the definite regulations of Congress upon the subject of the survey and sale of the public lands, that the second survey of the space between block twenty-nine and the main channel of the river, cannot affect the title of the complainant as acquired from the United States under the antecedent official survey and sale.' (289.)

In Mitchell vs. Smale, Mr. Justice Bradley said,

"We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. * * * * Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment. * * * * We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud; in which

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NOTE 32—R. R. Co. vs. Schurmeir, 74 U. S., 272, 289 (1868);
Hardin vs. Jordan, 140 U. S., 371, 383 (1891);
Mitchell vs. Smale, 140 U. S., 406, 412-3 (1891);
Moore vs. Robbins, 96 U. S., 530, 533 (1877);
Davis vs. Weibbold, 139 U. S,. 507 (1891);
Gr. Rapids vs. Butler, 159 U. S., 87 (1895);
Smelting Co. vs. Kemp, 104 U. S., 636, 646 (1881);
Lindsey vs. Hawes, 67 U. S., 554, 560-1 (1862);
Cragin vs. Powell, 128 U. S., 691 (1888);
Webber vs. Boom Co., 62 Mich., 626, 635 (1886);
Shufeldt vs. Spaulding, 37 Wis., 662 (1875);
State vs. Shooting Club, 127 Mich., 580, 587 (1901);
Stoner vs. Rice, 121 Ind., 51, 56 (1889);
McCormick vs. Huse, 78 Ill., 363, 373-4 (1875);
Railroad vs. Railroad, 26 Minn., 31-34 (1879);
Webber vs. Axtell, 94 Minn., 375 (1905).

case the government would have the right to recall the survey, and have it corrected by the Courts, or in some other way."

In Moore vs. Robbins, Mr. Justice Miller said,

"But in all this there is no place for the further control of the Executive Department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed, and delivered to and accepted by the grantee. * * * * If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership, which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land-office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title." (533-4.)

In **Hardin vs. Jordan**, notice had been given to the holder of the older patent of application for survey of (claimed) unsurveyed lands. The Secretary of the Interior had determined "the right of the government to survey, and grant the land." Mr. Justice Bradley said,

"If the lands had been previously disposed of, the department had no jurisdiction over them, and the question whether they have or have not been previously disposed of is a judicial question and not determinable by the executive department, except for the purpose of governing its own conduct in the administration of its functions." (401.)

SIZE OF RIVER.

The **size of the river** has no logical bearing upon the question. (33.)

In Jones vs. Soulard, Mr. Justice Catron said,

"The doctrine, that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark, has no application in this case; nor does the size of the river alter the rule. To hold that it did, would be a dangerous tampering with riparian rights, involving litigation concerning the size of rivers as matters of fact, rather than proceeding on established principles of law." (65.)

In Jeffries vs. East Omaha Land Co., Mr. Justice Blatchford said, referring to Jones vs. Soulard,

"It was held that a riparian proprietor on the Mississippi River at St. Louis was entitled as such, to all accretions as far out as the middle thread of the stream; and that the rule, well established as to fresh-water rivers generally, was not varied by the circumstances that the Mississippi at St. Louis is a great and public waterlcourse. * * * * * Nor did the size of the river alter the rule." (190.)

In Franzini vs. Layland, Justice Marshall said,

"Appellants' counsel further contend that the rule which generally prevails in this state, * * * should not apply to large rivers like the Mississippi. No authority is cited to support such contention, and we venture to say that none exists. The authorities are distinctly to the effect that no discrimination can reasonably be made on account of the size of rivers." (81.)

NOTE 33—Jones vs. Soulard, 65 U. S., 41 (1860);
Jeffries vs. East Omaha Land Company, 134 U. S., 178 (1890);
Franzini vs. Layland, 120 Wis., 72 (1903);
Morgan vs. Reading, 11 Miss., 366 (1844).

In Morgan vs. Reading, Chief Justice Sharkey said,

"It seems that the common law rule admits of no modification in consequence of the magnitude of a river." (403.)

FRAUD OR MISTAKE.

These islands were not omitted from survey by **mistake or fraud.** They appear on the plat of the ordinary U. S. Survey of 1845. (Comp. Ex. "A"). They also appear on the Whelpley Map. (Ex. "E" or 23). Whelpley made triangulations to them from his base line. Neither Whelpley nor Mullett surveyed either of them.

If surveyed, they would have been subject to pre-emption entry and patent at $1.25 per acre, or less than $2.00 for both. Complaint states area of both islands at 1.45 acres. (Comp. Rec. p. 1, Par. II.) This is much less than survey would have cost. Inclusion in, not omission from, survey would have been a fraud.

Mullett's contract for survey, dated 2nd April, 1845, provided for a survey of "all those townships and fractional townships situated in the east point or upper peninsula of Michigan, which lie east of the upper margin and north of Lake Huron, including all the adjacent islands within the territorial limits of the United States, and **excluding** such islands and other lands as are, or may be, reserved for the Indians or for other purposes." (Exhibit 10, Rec. p. 128.)

Instructions Surveyor General to Deputy Mullett say,

"The greater part of this district is fractional townships on Lake Huron and on the Straits of St. Mary, embracing Drummonds, Sailors, Marquette, LaSalle and a great number of smaller islands. All these you will survey, connecting them by intersections or otherwise with the work on the main." (Rec. p. 130.)

This, of course, related to such islands as were then deemed worth surveying. Certainly such instructions cannot be construed to relate to every boulder or rocky knob sticking out of water.

That the **deputy so construed the instructions** appears from the fact that he surveyed the larger islands, and simply noted on his field notes the position of those deemed too small to be surveyed.

The **Surveyor General so understood the matter.** He approved the survey and caused the islands to be noted on the plats made in his office, showing the survey of the larger ones, and the position and approximate size of those not surveyed. (Comp. Ex. "A"). These plats were also approved by acquiescence of General Land Office. Exhibit "A" shows many unsurveyed, and many surveyed, islands. The area of smallest surveyed island, shown by this exhibit, is 3.90 acres, or just about three times the area of Island No. 2, the larger island herein involved.

MEANDER LINE.

The **unusual description** in the Patent aids the view that same carries title to the subaqueous land and the islands.

The same bounds the mainland "by the River St. Mary on the east, north and west." Bounding "by the river" means by the middle thread of the river. Practically all cases hold this rule.

The further boundary by course and distance, of the meander line of Whelpley's Survey, does not weaken the argument.

The meander line is, by presumption of law, imported into every patent of public lands bordering on a water course. (34.)

NOTE 34—Cragin vs. Powell, 128 U. S., 691 (1888);
United States vs. Texas, 162 U. S., 1 at 5 (1896);
Jeffries vs. East Omaha Land Company(134 U. S., 178 at 194-5 (1890);
Shufeldt vs. Spaulding, et al., 37 Wis., 662 at 668 (1875);
Whitney vs. Detroit Lumber Co., 78 Wis., 240 at 246 (1890);
Hardin vs. Jordan, 140 U. S., 371 at 380 (1891).

MEANDER LINE

In Cragin vs. Powell, Mr. Justice Lamar said,

"It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself." (696.)

But the **meander line is held not to limit the grant.** It only determines area. (35.)

The office of, and method of fixing, the meander line is clearly indicated by the following instructions of the Commissioner of the General Land Office:

Instructions of 1890.

"Meander lines should not be established at the segregation line between dry and swamp or overflowed land, but at the ordinary **low water mark** of the actual margin of the rivers or lakes on which such swamp or overflowed lands border. In cases where such meander lines were formerly established at the segregation line between dry and swamp or overflowed lands new and proper meander lines may be established under the direction of the Surveyor General and the township and section lines extended over such swamp or overflowed lands and the corners established, as hereinbefore provided, in order that the plats and field notes of surveys may show the actual facts in the case." (P. 34.)

NOTE 35—Hardin vs. Jordan, 140 U. S., 371 at 380 (1891);
Whitaker vs. McBride, 197 U. S., 510 at 512 (1905);
Railroad vs. Schurmeir, 74 U. S., 272 (1868);
Schools vs. Risley, 77 U. S., 91 at 110 (1869);
Yates vs. Milwaukee, 77 U. S., 497 at 504 (1870);
Bates vs. Railroad, 66 U. S., 204 (1861);
Grand Rapids vs. Powers, 89 Mich., 94 at 102-3-4-5 (1891);
Ryan vs. Brown, 18 Mich., 196 at 208-9-10 (1869).

Instructions of 1894.

"4. Meander lines will not be established at the segregation line between dry and swamp or overflowed land, but at the **ordinary high water mark** of the actual margin of the rivers or lakes on which such swamp or overflowed lands border." (P. 57.)

Further to this point, see Fuller vs. Dauphin, 124 Ill., 542,

"and in running meander lines the government surveyors always seem to have kept along the higher, dry banks, and not to have waded or gone over the low, wet peninsulas or little islands near the shore." (543.)

Parties purchasing property, shown by the United States surveys and plats to be riparian property, should not be **excluded from the water front.** (36.)

NOTE 36—R. R. vs. Schurmeir, 74 U. S., 272 (1868);
Land Co. vs. Sanders, 103 U. S., 316, 319 (1880);
Bates vs. R. R., 66 U. S., 204 (1861);
Lindsay vs. Hawes, 67 U. S., 554 (1862);
St. Claire vs. Livingston, 90 U. S., 46, 63 (1874);
Brown vs. Huger, 62 U. S., 305 (1858);
Hardin vs. Jordan, 140 U. S., 371, 380 (1891);
Mitchell vs. Smale, 140 U. S., 406, 412-3-4 (1891);
Jeffries vs. East Omaha Land Co., 134 U. S., 178, 195-6-7 (1890);
(Read this in view of difference between meanders of Mullett's Survey and Whelpley's Survey.)
Cragin vs. Powell, 128 U. S., 691 (1888);
Boorman vs. Sunnuchs, 42 Wis., 233 (1877);
Wright vs. Day, 33 Wis., 260 at 264 (1873);
Watson vs. Peters, 26 Mich., 508, 517-8 (1873);
Richardson vs. Prentiss, 48 Mich., 88 at 91-2 (1882);
Ice & Coal Co. vs. Ice & Coal Co., 10[illegible]ch., 227, 236 (1894);
Horne vs. Smith, 159 U. S., 40 at 46 (1894);
Pierre Marquette Boom Co. vs. Adams, 44 Mich., 403 (1880);
Forsyth vs. Smale, 7 Biss. 201, Fed. Cases 4950 (1876).

MEANDER LINE

In Boorman vs. Sunnuchs, Justice Lyon said,

"Another rule applicable to this case is that if the meander line and the actual water line differ, the latter is the true line of a lot bounded in terms by the meander line. * * * We conclude, therefore, that the lots of the plaintiff extended to the pond, notwithstanding the line of the pond and the meander line as actually run and marked may differ." (243.)

In Watson vs. Peters, Justice Cooley said,

"And the rule itself is too valuable and too important to be varied by so immaterial a circumstance as that the boundary on the water is defined by a line instead of by making use of words which to the common understanding would convey the same meaning." * * * *

"If on the face of the plat, by reference to which the defendant bought, there was anything distinctly indicating an intent on the part of the proprietors to make this case exceptional and to reserve to themselves any rights in front of the water lots marked on it after they should have been sold, the case would be different." (517-8.)

In Richardson vs. Prentiss, Justice Marston said,

"It thus appears to be well established that the bank and the water are correlative, and that one cannot be owned without touching the other; that the bank is the principal object; so that when the law once fixes the proprietorship of that, the soil of the river follows as an incident; or, rather, (as it has been said), 'as part of the subject matter, **usque ad filum aquae.**'" (91.)

In Hardin vs. Jordan, Mr. Justice Bradley said,

"The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and State Courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are those meandered; and that the waters themselves

constitute the real boundary. * * * It has never been held that the lands under water in front of such grants are reserved to the United States, or that they can be afterwards granted out to other persons to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain and to derogate from the value of natural boundaries, like streams and bodies of water." (380-1.)

Where lands are bounded by streams, and **monuments on the banks** are stated to be corners, the true corner is held to be the point in the middle thread of the stream opposite the given monument. (37.)

In Luce vs. Carley, Justice Cowen said,

"It is never thought that monuments mentioned in such a deed as occupying the bank of the river, are meant by the parties to stand on the precise water-line. They are used rather to fix the termini of the line which is described as following the sinuosities of the stream. * * * Where the grant is so framed as to touch the water of the river, and the parties do not expressly except the river * * * one-half the bed of the stream is included by construction of law." (453.)

In St. Clair vs. Livingston, Mr. Justice Swayne said,

"Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract." (63.)

NOTE 37—Luce vs. Carley, 24 Wend., 451, 453 (1840);
Seneca National vs. Knight, 23 N. Y., 498 (1861);
St. Clair vs. Livingston, 90 U. S., 46, 63-4-5 (1874);
Cold Springs Iron Works vs. Tolland, 63 Mass., 492, 495-6 (1852);
Newton vs. Eddy, 23 Vt., 319 (1851);
McCullock vs. Aten, 2 Ohio 425 (308) (1823-6);
Handy vs. Anthony, 18 U. S., 375 at 380 (1820);
Buck vs. Squiers, 22 Vt., 484 at 494 (1850).

The iniquity of any different rule is thus spoken of by Justice Redfield, in Buck vs. Squiers,

"Its chief object is to prevent the existence of innumerable strips and gores of land along the margins of streams and highways to which the title for generations shall remain in abeyance, and then, upon the happening of some unexpected event, and one consequently not in express terms provided for in the title deeds, a bootless, almost objectless, litigation shall spring up to vex and harass those who, in good faith, had supposed themselves secure from such embarrassment." (494.)

These mischiefs are well illustrated here. Complaint says of defendant's mainland that it is part of the Indian Reserve, but "does not extend to the northern boundary thereof, which is the Sraits of St. Mary, except at the easterly end, where it extends a considerable distance * * * into said strait." (Par. XIV, Rec. 15.)

In connection with this statement, observe the map showing the attempt of Mr. Wm. B. Cady, attorney of the M. L. S. P. Co., to enter a narrow strip, in shape of a shoe string, claimed by him to lie between Whelpley's meander and St. Mary's River. (Defts Ex. 21, Rec. 567-8. Also O'Hare's tracing of meanders.)

Respecting the supposed parcel, the Commissioner of the General Land Office said, as the fact is,

"The plat of survey shows no land between the shore line of St. Mary's River and the tract patented to Chandler (Rec. 573), such narrow strip not being represented upon any known map except the diagram filed by Mr. Cady with his application." (Rec. 573.)

Complainant's counsel seem to have the view that the title to Islands one and two passes with, and by description of, the adjoining mainland.

The complaint says,

"It was made the duty of the Secretary of War to direct the proper military officer to designate, or cause to be designated upon a map * * * * first, * * * * second, the position and extent of any other lot or lots which might be required for other public purposes; third * * * * and fourth * * * . The

Secretary of War caused to be so designated * * * * * the entire north fractional half of section six * * * such designation embracing said islands. * * * * On March 10, 1852, the Secretary of War transmitted said map to the Commissioner of the General Land Office * * * * " (Par. IX, Rec. 9-10.)

An examination of the map of March 10, 1852, shows no Islands one and two, although it included the space where said islands lie. (See Comp.'s Ex. 15.) The necessary inference is that the islands are within this designation on account that the same passed with the title to, and by the description of, the mainland.

The **United States itself** has proceeded upon the idea that proprietary ownership of subaqueous lands, to the middle thread of the stream, in the St. Mary's river, is in the owner of the mainland.

The United States, or an individual, being the owner of the mainland, and also adjacent islands, may separate the ownership of the islands from that of the mainlands. In such case, there is created a new thread of the stream between the mainland and the islands, and the owner of the island becomes the owner of the subaqueous land on each side of the island to the middle thread of each stream. (38.)

Claiming property (jus privatum) in Islands one and two, the United States forbade the defendant to extend its works beyond the middle thread of the stream between the mainland and the islands. (Rec. 285, 286, 304.) But it permitted the defendant to carry its works much further into the stream above the islands. (Rec. 269, 293, 302-3.)

NOTE 38—Whitaker vs. McBride, 17 U. S., 510, 514 (1905);
West vs. Fox River Paper Co., 82 Wis., 647, 655 (1892);
Wiggenhorn vs. Kountz, 23 Neb., 690, 696 (1888);
Stolp vs. Hoyt, 44 Ill., 219, 223-5 (1867);
Warren vs. Westbrook Mfg. Co., 86 Me., 32, 36 (1893).

TREATY OBLIGATIONS.

It is said that the treaty obligations of the United States forbid the application of the ordinary rule of riparian ownership of subaqueous lands to the St. Mary's River. And that, as to such river, such treaty obligations require that the property right in the subaqueous lands shall remain in the state of Michigan.

First. Treaty Obligations Abandoned.

The case comes to this Court on appeal from the Circuit Court of Appeals. Questions relative to treaty obligations are not within the jurisdictiion of that Court. If the United States intended to raise that question, the appeal should have been, from the Circuit Court, direct to this Court and not to the Circuit Court of Appeals. (Act March 3, 1891, Chap. 517, Sec. 5, 26 Stat. 828.) The act referred to provides in part,

"Sec. 5. That appeals or writs of error may be taken from * * the existing circuit courts direct to the Supreme Court in the following cases: * * * * *

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

* * * *

Sec. 6. That the circuit courts of appeals * * * shall exercise appellate jurisdiction to review * * * final decision * * * in the existing circuit courts in all cases other than those provided for in the preceding section of this act."

How can this court take jurisdiction of a question by appeal from a court which has no jurisdiction of the question? (39.) The stream can rise no higher than the fountain.

NOTE 39 — Verbeck vs. Verbeck, 6 Wis. * 159, * 163;
Spaulding vs. Ry., 57 Wis., 304, 306-7;
Baker vs. State, 56 Wis., 568, 575;
Timmins vs. Bonner, 58 Tex., 554;
Mulder vs. Corlett, 54 Mich., 80;
Dunnington vs. Bailey, 27 Ark., 508;
Abernathy vs. Moore, 83 Mo., 65.

A court of review will not consider questions not raised or passed upon in the court below. (40. Much less will it consider questions which could not be raised or passed upon in the court below for want of jurisdiction. (41.)

It cannot be answered that appellee's remedy was to move to dismiss in the Circuit Court of Appeals. The question of treaty obligations was not raised by the assignment of errors on appeal to that court. (Rec. 69-70-1-2.) Appellee objected to consideration of same. (Brief, p. 100.) Herein the assignment of errors shows an attempt to raise such question. (Asgt. 14, Rec. 835.)

Second. If Treaty Obligations Are to be Considered.

Complaint says,

"The State of Michigan, as sovereign proprietor, in trust, of the subaqueous lands lying under the waters of said Strait of St. Mary to the southward of the international boundary established as hereinbefore set forth, has never had and has not now any right or power to convey, release relinquish or abandon the title so held by said State in trust for the public, but is entitled to hold, and is forever bound to hold, said subaqueous lands for the use and benefit of the public and to maintain the waters over them as public waters; and that said subaqueous lands are held by said State by the same right, and subject to the same trusts and limitations, which obtain at the common law as to the dominion and sovereignty over, and ownership of, lands under tide waters on the borders of the sea." (Par. V, Rec. 4-5.)

NOTE 40—Walker vs. Sauvinett, 92 U. S., 90 (1875);
Cooley vs. Gillan, 54 Conn., 80 (1886);
Moody vs. Clark, 27 Me., 551 (1847);
Swecker vs. Swecker, 87 Va., 305 (1890);
Newcomb vs. Wood, 97 U. S., 581, 583 (1877);
Bogert vs. Phelps, 14 Wis., 88, 94 (1861);
Congar vs. Chamberlain, 14 Wis., 258, 262 (1861).

NOTE 41—Cary Mfg. Co. vs. Acme Co., 187 U. S. 427-8 (1902);
Ayres vs. Polsdorfer, 187 U. S., 585, 590-1-2 (1902);
Robinson vs. Caldwell, 165 U. S., 359, 362 (1896);
Refining Co. vs. New Orleans, 181 U. S., 277 (1900).

TREATY OBLIGATIONS

It is not plain to us what treaty obligations affect the question.

Complaint states (Rec. 4) that, by the **Webster Ashburton** treaty, (August 9, 1842, 8 Stat. 572),

"It was agreed between said contracting nations that all the water communications along the line so established shall be free and open to the use of the citizens and subjects of both countries."

We find no such provision in said treaty relating to the St. Mary's River. But we do find such provision relating to "the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage from the shore of Lake Superior to the Pigeon River as now actually used." Last part Article II.

Also,

"It is agreed that where, by the provision of the present treaty, the River St. John is declared to be the line of boundary, the navigation of the said river shall be free and open to both parties, and shall in no way be obstructed by either." Article III.

Also,

"It is further agreed that the channels of the River St. Lawrence, on both sides of the long Sault Island, and the Barnhart Island, and the channels in the River Detroit, on both sides of the Island Bois Blanc, and between that island and both the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the River St. Clair, with the lake of that name, shall be equally free and open to the ships and vessels and boats of both parties." Article VII.

The St. Mary's River seems to have been omitted from such agreement on account that it was not by nature navigable, but only floatable, and as to it no such provision seemed to the commissioners to be useful. The specific agreement as to each other river seems to emphasize the omission of this. It was then evident to the commissioners that the St. Mary's Rapids, and Niagara Falls, must be overcome by slack water navigation, in which case the water must be withdrawn into

canals within territory of one or other or both countries, as the event has proven.

That the Webster Ashburton treaty was not understood to provide that the water communications along the line so established "shall be free and open to the use of the citizens and subjects of both countries," except so far as therein specially provided, appears plainly from article 4 of treaty of June 5, 1854, (10 Stat. 1091) and especially that provision thereof that "the United States further engages to urge upon the State Governments to secure to the subjects of her Britannic Majesty the use of the several State canals, on terms of equality with the inhabitants of the United States." Probably this clause had especial reference to the Sault Ste. Marie Canal then in process of construction by Michigan.

To same effect is treaty of May 8, 1871.

Both governments have acted contrary to such view. Each has authorized the withdrawal of the waters of the river from the bed thereof into private canals within its territory for use for power. (Act Cong. June 13, 1902, 32 Stat. 361. Act Ontario, Rec. 332.)

Each has withdrawn the waters from the bed into canals within its own territory for use for navigation. And the United States has forbidden the use of its canal to the Canadian government. (Chicora incident, Rec. 338.)

Neither is it plain to us how or why any treaty obligation of the United States requires that the property right of the subaqueous lands shall remain in the state of Michigan. If the claim was that the property right in such lands must remain in the United States, the claim might appear less shadowy. But it is conceded that no such property right rests in the United States, nor any right except such as rests upon the constitutional power of the United States. (Comp. Rec. 3.)

If the property right to the subaqueous lands vested in the

riparian was absolute and unqualified, the claim would seem less shadowy. But the cases holding that the property right in the subaqueous lands is in the riparian, hold, substantially without exception, that such property right of the riparian is subordinate to all rights of the state and of the United States for public uses. (42.)

In Willow River Club vs. Wade, Justice Marshall said,

"To recapitulate in closing, the title to the beds of all navigable waters in this state was in the state originally in trust for public purposes, the same as the beds of streams navigable at common law; the state not only never has, but never can, legally abdicate that trust, or surrender such title, except subject to all public uses for which it was created; and while it is true that the title to the beds of such streams is in the adjoining landowners by implication of law, it is just as true that such title is subject to the public character of the waters, the same as if no surrender of title had ever taken place." (117.)

If Patentee is Not the Owner, Michigan Is.

The governmental title to the bed of the St. Mary's passed from the United States on the admission of Michigan as a state. (Comp. Par. III, Rec. 2, 3.) The complaint recites that

"thereafter on January 26, 1837, the state of Michigan was * * * erected * * * whereby the state of Michigan succeeded to the sovereignty over the land and water embraced within its borders, which included said islands Nos. one and two and the mainland immediately to the south thereof, and whereby the state of Michigan succeeded to the proprietorship in trust for the people of said state, and for the citizens of the United

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NOTE 42—Scranton vs. Wheeler, 179 U. S., 141 (1900);
Gibson vs. United States, 166 U. S., 269 (1897);
Scranton vs. Wheeler, 113 Mich., 565 (1897);
Franzini vs. Layland, 120 Wis., 72 at 81 (1903);
Willow River Club vs. Wade, 100 Wis., 86 at 117 (1898).

States and the public in general * * * of the subaqueous lands under the waters of said Strait of St. Mary, through which passes a commerce of enormous volume and value."

To this effect as to **jus publicum** are all the cases.

On the admission of Michigan as a state, and the making of patent of the adjacent mainland, the property right in the subaqueous lands passed from the United States to either the state of Michigan or the patentee. After making the patent, neither the governmental title, nor the proprietary title, neither the **jus publicum,** nor the **jus privatum,** in the subaqueous lands, remained in the United States, except so far as necessary to enable it to carry out its constitutional obligations, which, of course, included treaty obligations.

If the state has power to relinquish the proprietary interest in subaqueous lands in St. Mary's River to the riparian, defendant owns islands one and two. But if, as complainant says, the State cannot so relinquish the proprietary interest, then the State owns them.

If public policy requires that the property right of the subaqueous lands shall remain in the state of Michigan, and the unsurveyed islands are part thereof, and subject to the same policy, then the property right in the islands one and two is in the state of Michigan and not in the United States. (43.)

In People vs. Warner, Justice Hooker said,

"If it was not then in existence, it became the property of the State by virtue of its ownership of the submerged land at the bottom of the lake." (232.)

NOTE 43—Packer vs. Bird, 137 U. S., 661, 666-7, 672 (1891);
Sherwood vs. Land Comrs., 113 Mich., 227-8 (1897)
People vs. Warner, 116 Mich., 228 at 232 (1898);
State vs. Fishing & Shooting Club, 127 Mich., 580 (1901).

In State vs. Fishing and Shooting Clubs, Justice Hooker said,

"If it was a part of the bed of the lake at the time defendant began to improve it, it belonged to the State, and if it could be said to be an island at that time, such island might belong to the state. Whether it did or not, would depend upon its character in 1836, when the state was admitted." (591.)

Islands belong to riparian, if subaqueous lands do not.

If for any reason, on account of treaty or otherwise, public policy requires that the proprietary title to subaqueous lands in St. Mary's river shall remain in the state of Michigan, it does not require that the title to the islands shall remain either in the state, or in the United States.

It cannot be that public policy requires that the title to **unsurveyed islands** in St. Mary's river shall remain in the United States, while such policy does not require that the title to **surveyed islands** in said river shall so remain. There cannot be a requirement of public policy as to title to **unsurveyed islands** which does not apply to the title to **surveyed islands.** The uniform policy as to surveyed islands has been to part with title to the same. So also as to one unsurveyed island No. 5, only a few hundred feet from islands one and two. (Treaty of 1855-6, 11 Stat. 631.)

The **state** of Michigan, if it can, **has turned over the proprietary interest in the subaqueous lands** of St. Marys River to the riparians. The title of the riparian is, however, of course, subject to the full control of the same by the United States so far as necessary for purposes of navigation, and the full control of same by the State for all public purposes. What further right in such subaqueous lands could in any way aid in carrying out treaty obligations? The making of treaties, and by necessary implication, the carrying out of treaty obligations, rests with the United States under the constitution. Hence, so far as necessary to the carrying out of treaty obligations of the United States, the control of the waters and subaqueous lands of the St. Mary's River necessarily remains in the United States. Subject to such control, what reason of

public policy prevents the proprietary ownership thereof by the riparian?

The treaty obligation suggested is that "It was agreed * * * * that all the water communications * * * * shall be free and open to the use of the citizens and subjects of both countries." We have shown that the treaty contains no such provision, but if the same can be read in by construction, we cannot imagine how the riparian ownership of the subaqueous lands of the St. Mary's River could interfere with such use of the water communications. The use of such "water communications" can relate only to navigation, in respect to which Congress has ful control of all navigable waters, including the subaqueous lands.

Herein, the rights of the State and Nation, as such, grow out of, attend upon, and are measured by, their needs.

Hence we fail to see how treaty obligations of the United States forbid the alienation, by the state of Michigan, of the proprietary interest in the islands, or subaqueous lands, of the St. Mary's River.

The Provisional Articles of 1782, article 8, and the Definitive Treaty of Peace of 1783, article 8, both provide that

"The navigation of the river Mississippi, from its source to the ocean, shall forever remain free and open to the subjects of Great Britain and the citizens of the United States." (8 Stat. 57 and 83.)

These treaty provisions remain in force. (44.)

We cite seventeen cases (Note 24) to the effect that "the riparian owns the subaqueous lands on the Mississippi River."

Three of those cases, one decided in 1860, one in 1885, and one in 1890, are by this Court.

To the same effect are numerous cases on Det[illegible] River, St. Mary's River and St. Croix River.

NOTE 44—Senate Document 318, 58th Congress, Second Session. Senate Documents, Vol. 37, pp. 290, 296.

Stare Decisis.

In the first instance, it may be true, as said by Justice Powell, that "Nothing is law that is not reason." But, after a decision has been rendered, the language of Sir Wm. Jones is more important. He says, respecting the maxim of Powell, "This is a maxim, in theory, excellent; but in practice dangerous; as many rules, true in the abstract, are false in the concrete."

"It is not always that Courts may freely inquire, in determining a case before them, What is the law? Sometimes investigation should stop when it is ascertained what has been decided upon the subject." Harrow vs. Meyers ,29 Ind., 69, at p. 470.

"That judge who * * * would overturn a rule which for years had settled the rights of property, should be regarded as the common enemy of mankind, and as unworthy of the high trust that had been confided to him." Welch vs. Sullivan, 8 Calif., 165, 188.

"None but the strongest reasons would justify."

"Fickleness in Courts is always to be deprecated, but especially in matters relating to titles to real estate." Pioche vs. Paul, 22 Calif., 106, 110.

"The error would have to be the most palpable to justify this Court in overruling previous decisions. The stability of judicial decisions is of the utmost consequence, as on them reposes the security of property; and they are not to be tampered with to suit the views of different persons." Reed vs. Owmby, 44 Mo., 204, 206.

This construction having become a rule of property, it should not be changed without an imperious necessity." Taylor vs. French, 19 Vt., 49, 53.

"When a rule of property has been once deliberately adopted and declared, it ought not to be disturbed by the same Court, except **for very cogent reasons**. Otherwise the community would never be able to deal with safety and would be in a state of perplexed uncertainty as to the law." Goodell vs. Jackson, 22 Johns., 693, 722.

"But when a question has been well considered and deliberately determined, whatever might have been the views of the court before which the question is again brought, had it been **res nova**, it is not at liberty to disturb or unsettle such decision unless impelled by the **most cogent reasons**. Baker vs. Lorillard, 4 N. Y., 257, 261.

"When, as in this case, the decision has relation to large amounts of a species of property which assumes a value in the market, changes hands and is dealt with upon the confidence reposed in the correctness of the decision of the highest judicial tribunal in the State, nothing short of the most urgent necessity, to prevent injustice, or vindicate clear and obvious principles of law, would justify us in departing from it." Kearny vs. Buttles, 1 Oh. St., 362, 366.

"It would be better, no doubt, if all judicial decisions were made upon correct logical principles, but that cannot be while intellectual infirmity exists, and experience has shown that it is less injurious to endure the evils of an unsound precedent than to change it when the result would cause confusion and disappoint and damage parties who have relied upon it as an established rule of law." Paulson vs. Portland, 16 Oreg., 450, 457.

"That decision was rendered by judges occupying the same position as we do, and, while we do not indorse it, nor regard the reasons upon which it was predicated as satisfactory, yet we do not feel at liberty to depart from it in this particular case." Corvallis vs. Stock, 12 Oreg., 391.

"To overthrow decisions thus made, except upon the most cogent reasons, would be productive of the highest mischief." Bellows vs. Parsons, 13 N. H., 256, 261.

"Such rules become landmarks and ought to be preserved like ancient monuments or immemorial boundaries to land." Anderson vs. Jackson, 16 Johns., 382, 402.

Fisher vs. Horicon I. & M. Co., involved the consideration of the constitutionality of the mill dam law, so called. Justice Cole said,

"The main question which we are invited to consider is the constitutionality of the mill dam law. This question we cannot regard as open for investigation and discussion at the present time. It was fully and carefully considered * * * in the case of Newcome vs. Smith * * * and the constitutionality of the law affirmed." (10 Wis., 351-2.)

"Considerations of this nature, relating to questions of property acquired under the belief that a former decision was correct, cannot be disregarded when we are called upon to set such decision aside. The rule **stare decisis** has great force in such a state of things and emphatically applies." (354.)

Babb vs. Mackey involved the constitutionality of the mill dam law. Therein Justice Cole said, referring to the case of Fisher vs. Horicon I. & M. Co.:

"We are earnestly pressed by counsel who denied that power, and the validity of our present law, to reconsider the decision of the former Supreme Court in the case of Newcome vs. Smith * * * * For reasons given in the opinion in that case, we have declined to depart from the doctrine laid down in Newcome vs. Smith, and consequently the power of the legislature to pass such laws is not now an open question. (10 Wis., 371-377.)

Absence of legislative action emphasizes the r[illegible]e. (45.)

NOTE 45—Emerson vs. Atwater, 7 Mich., 12 at 23 (1859);
Loeb vs. Mathis, 37 Ind., 306, 312 (1871);
Lemp vs. Hastings, 4 Ia., 448, 449-50 (1854);
Pioche vs. Paul, 22 Calif., 106, 110 (1863);
Rockhill vs. Nelson, 24 Ind., 422, 424 (1865);
People vs. Cicott, 16 Mich., 283, 310 (1867);
Grubbs vs. The State, 24 Ind., 285, 296 (1865).

Emerson vs. Atwater did not relate to water rights or riparian rights, but to a general question respecting title to land. Therein, Justice Manning said,

"We refer to these cases to show the general understanding of the bench and bar on this subject, and the injustice that would be done by overruling, at this late day, the case of Wadsworth vs. Loranger, to those who may have looked to that case for the law, and have acquired rights under the law as there laid down. This consideration, of itself, if we believe that case to be erroneous in principle, which we do not, would cause us to hesitate long before overruling it, believing it would be both better and safer to leave it to the legislature to correct the error than to undertake it ourselves, as all intervening rights would in that case be saved, and injustice be done to no one." (23.)

This suggestion that "it would be both better and safer to leave it to the legislature to correct the error," if there be any, is peculiarly applicable to the question under consideration. The rules respecting riparian rights are general and have wide application and are well known, and the legislature must be supposed to know the general effect and tone of the decisions. Their silence respecting them amounts to ratification.

Loeb vs. Mathis involved a question of practice in trespass upon real estate. Justice Gregory said,

"But whatever opinion may be entertained of the 28th section of the code, independent of the adjudged cases, it cannot now, as a rule of construction, be considered an open question. A long line of uniform decisions construing a statute, in the face of the fact that the legislature, for a long series of years, has acquiesced in such construction, cannot, with any judicial propriety, be disregarded or lightly treated." (312.)

Lemp vs. Hastings related to place of taxation. Justice Greene said,

"If the principle established by that case has not been changed by legislation since 1850, it follows that the rule adopted in that case should govern in this. When a rule or principle of law has been fully recognized by the Supreme Court, it should not be overruled unless it is palpably wrong,

or has been changed by legislative enactment. In reference to the principles involved in this case, there has been no such change. (449-50.)

Pioche vs. Paul involved constitutionality of legislation. The court said,

"No attempt has been made by the legislature since the invalidity of the act * * * * was declared by this Court, to re-enact the same in a form free from constitutional objections. Under these circumstances, this court is asked to review its decision in that case and to overrule it." (110.)

Rockhill vs. Nelson related to the descent of property under the statutes. Justice Gregory said,

"There are some questions in law the final settlement of which is vastly more important than how they are settled, and among these, are rules of property long recognized and acted upon, and under which rights have vested. * * * We cannot change a decision without producing a confusion in titles, as the ruling would necessarily relate back to the time the law came in force. But if canon of descent as settled by the determination of the Court of last resort is unjust or even distasteful, the legislature can change the rule by new statute without interfering with vested rights." (424.)

The People vs. Cicott related to election by ballot. Therein Justice Christiancy said,

"But the rule in People vs. Tisdale was recognized in People vs. Higgins, 3 Mich., 233, and has now been the settled law of this state for a quarter of a century. * * * The legislature have full control over this question and may change the rule when the public sentiment shall seem to require." (310.)

Grubbs vs. The State was a prosecution for violating a statute. Therein Justice Frazer said,

"This very question was decided by this Court against the validity of the enactment more than five years ago. * * * Three legislatures have since held their sessions and adjourned without, we believe, even attempting to enact the provisions

thus held void, in a form which would be free from the constitutional objections then urged to exist. * * * We ought, in any case, to proceed with great caution in reversing opinions heretofore pronounced by this Court and received and acted upon as settling the law. And especially when a rule of property would be overturned, and that would be made criminal which had before been adjudged lawful. In such cases, it were even better that what is settled should not be disturbed by judicial action, though it be wrong." (296.)

The rule, **stare decisis**, is nowhere of more importance than in relation to the rights of riparians. This Court recognizes the control of each state over the matter of riparian rights. (46.) Each state recognizes the fact that it, for itself, makes the law. This law is made by legislation, or, in its absence, by judicial decision.

In Barney vs. Keokuk, Mr. Justice Bradley said,

"Whether as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights, which properly belong to them in their sovereign capacity, it is not for others to raise objections." (338.)

This language is quoted with approval by Mr. Justice Field, in Packer vs. Bird, at 671.

In Webber vs. Pere Marquette Boom Co., Justice Champlin said,

"It is settled in this state that the title of the riparian extends to the middle line of the lake or stream of the inland wa-

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NOTE 46—Barney vs. Keokuk, 94 U. S., 324 at 338 (1876);
Packer vs. Bird, 137 U. S., 661 at 671 (1891);
Webber vs. Pere Marquette Boom Co., 62 Mich., 626 at 636 (1886);
Hall vs. Alford, 114 Mich., 165 (1897);
Hardin vs. Jordan, 140 U. S., 371, 384, 387 (1891);
Franzini vs. Layland, 120 Wis., 72 at 78 (1903);
Porterfield vs. Clark, 43 U. S., 76 at 125 (1844).

ters * * * This has become a rule of property in this state, and the Supreme Court recognizes the right of each State to determine the doctrine for itself." (636.)

Hall vs. Alford involved riparian rights on navigable waters. Therein, Chief Justice Long adopted the language above quoted from Webber vs. Boom Co. (168.)

Hardin vs. Jordan holds to the rule of the State of Illinois, relative to title of submerged lands at date of patent, though the State Court had departed from it. Therein Mr. Justice Bradley said,

"We do not think this argument **ab inconvenienti** is sufficient to justify an abandonment of the rules of the common law, which, as we have shown, have been adopted in Illinois as the law of the land. It is too much like judicial legislation." (397.)

In Franzini vs. Layland, Justice Marshall said,

"There is no opportunity now for retreat. The State has taken its position, and property rights upon all our rivers have become vested with regard thereto, and the Supreme Judicial authority has many times affirmed that it possesses discretionary authority to part with its trust property to the extent mentioned.—That is in such ways as do not substantially affect the purposes of the trust." (82.)

In Porterfield vs. Clark, Mr. Justice Catron said,

"The rule in this Court is settled that each state has the right to construe its own statutes and especially those barring titles. In the case of Green vs. Neal, 6 Peters, 291, it was held that this Court uniformly adopted the decisions of the state tribunals respectively in construing their statutes. That this was done as a matter of principle in all cases where the decisions of the state Court had become a rule of property." (125.)

This Court has determinedly sustained rules of property once established by the state courts. Where property has been acquired or contracts made in view of, and on faith in, a settled rule established by the State Courts, the federal Courts

will not depart from such established rule on account of subsequent variant State decisions. (47.)

The Chandler Patent bears date December 15, 1883 (comp. Rec. 15). The rights of the patentee should be determined by the law as it then stood.

There can be no doubt that, at that time, the settled doctrine in Michigan was that the riparian owner, on the small inland lakes, and on the rivers, of Michigan, owned to the middle thread of the lake or stream. Such doctrine plainly appears in the decisions rendered before the issue of the patent (48), all but one of which was rendered before the application of Chandler to locate.

NOTE 47—Hardin vs. Jordan, 140 U. S., 371, 384, 389, 397, (riparian rights) (1891);
Morgan vs. Curtenius, 61 U. S., 1 (title to lands) (1857);
Gelpcke vs. Dubuque, 68 U. S., 175 (municipal bonds) (1863);
Muhlker vs. R. R., 197 U. S., 544 (eminent domain) (1905);
Lee County vs. Rogers, 74 U. S. 181 (county bonds) (1868);
Douglas vs. Pike County, 101 U. S., 677 (county bonds) (1879);
Supervisors vs. Schenck, 72 U. S., 772, 785 (county bonds) (1866).

NOTE 48—Lorman vs. Benson, 8 Mich., 18, (Detroit River) (1860);
Rice vs. Ruddiman, 10 Mich., 125, (Muskegon Lake) (1862);
Ryan vs. Brown, 18 Mich., 196, (St. Mary's River) (1869);
Clark vs. Campau, 19 Mich., 325, (Detroit River) (1869);
Watson vs. Peters, 26 Mich., 508, (Saginaw River) (1873);
Bay City Gas Light Company vs. Industrial Works, 28 Mich., 182, (Saginaw River) (1873);
Attorney General vs. Booming Company, 34 Mich., 462, (Muskegon River) (1876);
Backus vs. Detroit, 49 Mich., 110, 114-5, (Detroit River) (1882).

STARE DECISIS

Rice vs. Ruddiman involved the rights of riparians on Lake Muskegon. No special case was referred to, but Justice Christiancy, referring to common usage, said,

"To repudiate this common usage at this late day, by creating an arbitrary distinction which has no foundation in the nature of things, and to recognize in the State, or the United States, a proprietorship in the beds of the hundreds of lakes and natural ponds within her limits wouuld, in my opinion, be an unwarrantable interference with private property, and do incalculable mischief." (142.)

RIVER OR STRAIT.

The complaint says that the complainant is the owner of islands one and two "situated in the Straits of St. Mary." (Comp. Rec. 1.) (See also O'Hare's Map, Ex. 37.) The answer says that these islands ar[illegible] the **River** St. Mary, and not in the **Strait** of St. Mary. (An[illegible] Par. IV, Rec. 21-2.) Evidently the complainant wishes to avoid the well established rule of ownership by the riparian of the subaqueous lands, and hence classifies the stream running past islands one and two as a **strait** and not as a **river**. So far as we know, this stream has been uniformly called a river until defendant herein filed its bill in equity against the Michigan Lake Superior Power Co. to restrain diversion of the water of the river through its hydraulic canal. In that case, the Michigan Lake Superior Power Company, for the first time, classified the stream as a **strait** and not a **river**. (Rec. 583 to 588.) It had, before that time, classified the stream as a **river**, after it knew of its contention with the defendant herein respecting the diversion of the water (H. Doc. 358-56-1, pp. 7, 8, 14, 15, 30-1-2, 44-5, 50). See also schedule attached to application of M. L. S. P. Co. to the supervisors of Chippewa County on October 10, 1898. (Rec. 596.) See also enabling act (No. 154, Act. Cong., 1901-2, Rec. 598.) The articles of organization of the M. L. S. P. Co. state that the business and object of said company was to be

"To excavate and construct and maintain * * * * a canal or canals from point above the falls of St. Mary's river * * * to some point or points on said river below said falls." (Rec. 594.)

Also see Cady's application (Rec. 568).

Straits and **Rivers** have been defined as follows:

Definitions of Strait.

"A narrow pass or passage, either in a mountain or in the ocean, between Continents, or other portions of land; as, the Straits of Gibraltar, the Straits of Magellan, the Straits of Dover."

Webster's Dict., Ed. of 1859 and Ed. of 1875.

"A (comparatively) narrow passageway connecting two large bodies of water—often in plural; as the Strait or Straits of Gibraltar, the Straits of Magellan, the Strait or Straits of Mackinac."

" 'We steered directly through a large outlet which they called a strait, though it be fifteen miles broad.' De Foe."

Webster's Dict., Ed. of 1895.

"1. A narrow passage of water connecting two larger bodies of water. Often plural, as Hudson Straits, the Straits of Gibraltar."

Standard Dict., Ed. of 1895.

"A narrow passage of water connecting two bodies of water."

Century.

Definitions of River.

"A large stream of water flowing in a channel on land toward the ocean, a lake, or another river. It is larger than a rivulet or brook; but is applied to any stream from the size of a mill stream to that of the Danube, Amazon and Mississippi. We give this name to large streams which admit the tide and mingle salt water with fresh, as the Rivers Hudson, Delaware and St. Lawrence." Webster's Dict., Ed. of 1859.

"A large stream of water flowing in a channel on land toward the ocean, a lake, or another river. It is a stream larger than a rivulet or brook." Webster's Dict., Ed. of 1875.

"A large stream of water flowing in a bed or channel and emptying into the ocean, a sea or lake, or another stream; a stream larger than a rivulet or brook." Webster's Dict., Ed. of 1895.

"A stream of water larger than a brook, creek, or rivulet, and discharging into a larger body of water, as the ocean, a lake, or another stream." Standard Dict., Ed. of 1895.

"As a general proposition, wherever there is a steady, uniform current of water, it constitutes a river, though this does not include a lake through which there is a current from its head to its outlet." Emory Washburn, Am. Law of Easement, p. 209, quoted in Standard Dict., under head "River."

"A considerable body of water flowing with a perceptible current in a certain definite course or channel and usually without cessation during the entire year."

"In law a stream of flowing water of greater magnitude than a rivulet or brook."

"The Orinco * * * is over three miles wide at 560 miles from its mouth." Century Dic.

"The width of the main mouth (of the Amazon) is 50 miles." Century Dict., Val. proper names, p. 48.

"River. A body of flowing water of no specific dimensions, larger than a brook or rivulet, less than a sea; a running stream pent on each side by walls or banks.

A considerable stream of water that has a current of its own flowing from higher level which constitutes its source to its mouth, where it debouches." Anderson's Dict., p. 908.

"When it appears that the water is not a lake nor a pond * * * the only criterion by which to determine whether it is a river is the existence of a current."—Angell Water Courses, p. 7, Section 4f.

"A river is a running stream of water." Gould on Waters, Sec. 41.

"Rivers are 'bodies of water of considerable size, flowing with perceptible currents in definite channels and rarely without cessation during the year.'" Encyc. Am.

If, at any point in the water communication between Lakes Huron and Superior, there is what may properly be

called a river, it is at the rapids, where the stream passes islands one and two.

Treaties.

It seems to us that the most authoritative classification of the stream is that made in **Treaties** and **Negotiations** resulting in Treaties, respecting it. Such documents are drawn with the utmost care, and every expression is thoroughly scrutinized before the treaty is adopted. We take the following excerpts from divers treaties respecting this stream:

"Beginning at the Big Rock in the River St. Mary's, on the boundary line between the United States and the British province of upper Canada." Treaty June 16, 1820, negotiated by Cass. (7 Stat. 206.)

"Through the Straits and River St. Mary's to a point in Lake Superior." Treaty of March 28, 1836, negotiated by Henry R. Schoolcraft. (7 Stat. 491.)

"Until it strikes a line * * * * passing across the river at the head of St. Joseph's island and at the foot of the Nebish Rapids, which line denotes the termination of the boundary directed to be run by the sixth article of the Treaty of Ghent." (Decision of Commissioners under Sixth Article of Treaty of Ghent, 8 Stat. 276.)

"Thence west of Jonas Island into St. Mary's River to a point in the middle of that river about one mile above St. George's or Sugar Island, so as to appropriate and assign the said island to the United States. Thence adopting the line traced on the map by the Commissioners through the River St. Mary to Lake Superior, to a point north of Isle Royal." Webster-Ashburton Treaty, Art. III. (8 Stat. 573.)

"A small island in the River St. Mary's adjacent to the camping gropnd." Treaty, August 2, 1855, (11 Stat. 631.)

Speaking of St. George's Island, Mr. Barclay, English Commissioner, said, "An additional reason for giving Great Britain the power to control the navigation at the St. Mary's River." (Moore Int. Arb., Vol I, p. 177.)

Legislative Acts.

It seems to us that the second most authoritative classification is that made in **legislative acts**, referring to the same as a boundary.

Act of Ter. Mich., Dec. 22, 1826, organizing County of Chippewa, gives as part of its boundaries:

"Beginning on the north side of Lake Huron, at Isle St. Vital, running thence due north until it strikes a river which falls into the north-west part of Muddy Lake of the River Sainte Marie, thence up said river to its source, thence west." (Territorial Laws Michigan, Vol. 2, P. 295.)

Act to incorporate Chippewa Portage Co. gives right to construct railway from "the Ste. Marie River." (Mich. Law 1847, P. 98.)

Act of Territory of Michigan, April 12, 1827, in giving boundary of the township of St. Marie, says, "returning with said line down the St. Marie River to the place of beginning." (Ter. Laws Mich. 2, P. 481.)

Act 39, 1883, authorized corporations organized under it,

"To divert into any canal, excavated or constructed under the provisions of this act, whether from Lake Superior or St. Mary's River." (Compiled Laws 1897, Sec. 6797.)

The general law of Michigan respecting fishing refers to "The Sault Ste. Marie, St. Clair, Saginaw, and Detroit Rivers." (Compiled Laws of 1897, Sec. 5808, 5865.)

See also Laws of Michigan, 1847, P. 104, also 1849, P. 46.

RIVER OR STRAIT

The islands in "The River St. Mary's." Acts Congress, 1847, 9 Stat. 146.)

In 1852, Congress referred to this stream as the "St. Mary's River." (10 Stat. 35.)

In 1882, Congress authorized the international railroad bridge, "across the Sainte Marie River, at or near the rapids in said river * * * * for the use of, and connection of, railroads whose business crosses or will cross the river at said locality, and whose lines of road are now, or may hereafter, approach the river at that place * * * * all the trains of all the roads terminating at said river at that place * * * * the free navigation of the said river within the waters of the United States." (2 Stat. 154.)

Again in 1896, Congress provides for,

"Anchorage of vessels and rafts in St. Mary's River from Point Iroquois, on Lake Superior, to Point Detour, on Lake Huron * * * * to detail one or more revenue cutters for duty on said river."

In 1898-9, Congress legislated for lights at the "Head of St. Mary's River, Michigan. Sets of range lights to mark the channel at the entrance of St. Mary's River." (30 Stat. 602.)

Act of Congress approved June 13, 1902, licensed the M. L. S. P. Co. "to divert water from the St. Mary's River into the water power canal now being constructed at Sault Ste. Marie for water power purposes." (57th Congress, 1st Sess. No. 154, P. 361.) Said act also in several other places refers to "Said river" and "the River Saint Mary's."

Probably there has not been a session of Congress since 1877 in which there has not been legislation wherein this stream is classified as a river. Neither has there been, probably, a year since 1877 in which the stream has not been classified as St. Mary's River in the report of the Chief of Engineers

to the War Department submitted to Congress by the President with his annual message. In fact, we think that this stream has never been mentioned in any public or official document of the State of Michigan or of the United States, otherwise than as a river.

Acts of Ontario call it "St. Mary's River," Laws 1889, Ch. 88. Rec. 333.)

Official Documents.

In his opinion given to the M. L. S. P. Co., March 14, 1899, the Hon. Horace M. Oren, Attorney General, says,

"You have asked me to give you an official opinion upon the question of what rights the Michigan Lake Superior Power Company, a corporation created and organized under and by virtue of Act No. 39 of the Session Laws of the State of Michigan for the year 1883, has to draw water from the upper level of the St. Mary's River, and the lower end of Lake Superior, into a canal debouching from the St. Mary's River above the rapids, and returning to the river at a point below the rapids, at Sault Ste. Marie, Michigan." (Opinions 1899, P. 109.)

U. S. Geolog. Surveyor Irving calls this water "St. Mary's River." (U. S. Geolog. Survey, 5th Ann. Rep. 1883-4, pp. 187-8-9, 223-4, 227.)

Houghton, State Geologist, thus states the place of beginning of the River St. Mary:

"Commencing with the mainland at the first or lower point of contraction in the Montreal channel of the Ste. Marie river. * * * At that point in the Montreal channel before alluded to, the first perceptible current was noticed, and this may, therefore, in reality, be considered as the termination of this arm of Lake Huron, as well as the commencement of the Ste. Marie River." (Mich. S. D. 1840, Vol. 2, pp. 72-73.)

U. S. Engineer Haskell gives the length of the river as 62

miles along the main channel; and the fall as 20.74 feet; and says,

"The stream is one that would be called permanent."

(App. C. C. C., P. 4093. Report of Chief Engineers, 1897.)

This stream is called a river in Foster and Whitney's report, 1850. (Ex. Doc. No. 69, 31st Congress, 1st Session, at pp. 1, 18, 27, 31, 32, 50, 53. Part II., pp. 13, 155, 268, 269, 397.)

Same is called "St. Mary's River" in Lake Survey Charts introduced by complainant. (Rec. 212.)

Down to January 21, 1903, this stream had, so far as we can learn, been uniformly called, by all departments of the United States, a river. But on that day, the Secretary of the Interior, in a letter to the Department of Justice, calls it "St. Mary's River or Strait." (Rec. 255.) Same in first bill filed by United States. (Rec. 659.) Same in letter of Attorney General to Mr. Covell. (Rec. 684.) In the bill herein and in the answer of the M. L. S. P. Co., to the bill of Ch. D. W. P. Co., it is called "Straits of St. Mary."

There seems to be an intent to classify this stream as a strait for the purpose of argument in this case and the case of Ch. D. W. P. Co. vs. M. L. S. P. Co. But the War Dept. has not adopted the new classification. In every annual report from 1878 to 1907 inclusive, this stream is called St. Mary's River. (For 1907, see Ann. Rep. Chief of Eng'rs 685. 687. 690. 691. 2009. 2036. 2059. 2457.) Such classification was adopted in 1902 with approval by Francis H. Clergue, President of the M. L. S. P. Co. (Rep. 1905, p. 326.)

Cyclopedias.

Americana, "Saint Mary's, a river connecting Lake Superior and Lake Huron * * The river is spanned by the International Bridge * * There are a number of well-wooded islands in the river."

Century, "St. Mary's river. 1. The outlet of Lake Superior into Lake Huron, 55 miles." (P. 885.)

"St. Mary's Falls. The rapids in St. Mary's River between Lakes Superior and Huron." (P. 900.)

Brittanica, "St. Mary's River, 55 miles long, is the only outlet from Lake Superior, and its course to Lake Huron is but a succession of expansions into lakes and contractions into rivers."

Johnson's Universal, "St. Mary's River: A stream which flows from Lake Superior to Lake Huron, and has a length of about 40 miles."

Chamber's, "St. Mary's River; the strait connecting Lakes Huron and Superior with a 'Sault' or rapids falling 20½ feet."

Longman's, p. 1347. "St. Mary's River, the river connecting Lakes Superior and Huron."

New International, V. 12, p. 337, "St. Mary's River, the channel connecting Lake Superior with Lake Huron. It flows 40 miles south-eastward."

Early History.

The earliest description we find of this stream of water is in the correspondence of the Jesuit missionaries with their Superiors.

The third volume of Smith's History of Wisconsin gives a translation of some of these documents, the originals of which are to be found in the library of Harvard College.

A letter from the mission at Sault Ste. Marie in 1647-8 says of the Algonquin nations,

"Who dwell upon the shores of another lake, still larger than the 'Mer-douce' (fresh-water sea), into which it discharges itself by a very large and rapid river, which, before mingling its waters with our 'fresh-water sea' makes a fall, or leap, that gives a name to those people who come to live there during the fishing season."

(Smith's History of Wisconsin, Vol. 3, p. 15.) This "Mer-

douce'' (fresh-water sea) was Lake Huron. (Parkman, French and English in North America, Part I, p. 366.)

In 1667, names had been given to these lakes and on November 10, 1667, one of these letters says,

"Toward the beginning of September, after having coasted along the shores of Lake Huron, we arrived at the Sault; it is thus that they call half a league of rapids in a beautiful river, that forms the junction of the two great lakes, Huron and Superior." (Ib. 39.)

Father Allouez in a report to his superior says of the Indians,

"They believe that the Superior Lake is a pond made by the beavers, the banks of which were double; the first, at the place which we call the Sault, the second, five leagues lower down. In coming up the river, they say, this same god first encountered the second embankment, which he tore entirely away; and for this reason there are no falls or turbulent waters at these rapids. As for the first, being in a hurry, he only walked over it and trampled it to pieces, in consequence of which there still remain large falls and boiling waters." (Ib. 59.)

In his History of the Jesuits in North America, Parkman speaks of the military post mentioned in complainant's complaint (Compt. P. 15). He says,

"The fortified works * * * lay parallel with the river, and somewhat more than a hundred feet distant from it. * * * The sides towards the river and the lake had no other defences than a ditch and a palisade." (P. 362.)

"Beyond the ditch or canal which opened on the river was a large area, still traceable, in the form of an irregular triangle, surrounded by a ditch, and apparently by palisades." (P. 363.)

Schoolcraft speaks of the Strait of St. Mary, and of the River St. Mary's. In Indian Tribes of the United States, he speaks of the River St. Mary in Part III, at P. 604, in Part IV,

at P. 192, in Part VI, at P. 202, 398. In Part VI, at P. 33, he speaks of "the Strait and River of St. Mary." He also says,

"The Lake or Strait may be supposed to cease and the River to commence at the foot of the first rapids called Miscoutin or Nebish, as there is no perceptible current below it." (Narrative Journal of Travels, P. 128.)

Hence it appears that he classifies a part of the water connecting Huron with Superior as a river, and part of it as a strait. So also does Geologist Houghton. So also did the Commissioners under the Treaty of Ghent.

Legal Decisions.

This stream is designated as St. Mary's River in divers legal decisions. (49.)

Estoppel.

The United States has continuously represented this stream to be a river. It has so designated it in its legislative acts, in reports of its public officers, and on its maps.

Map No. 2 of International line showing where same passes Islands one and two is entitled "Continuation of the Map of the River Sainte Marie." (Ex. 5, Rec. 78-9.) Also Map No. 1, same series.

NOTE 49—United States vs. Repentigny, 72 U. S., 211 at 257 (1866);
Scranton vs. Wheeler, 113 Mich., 565-6 (1897);
Spaulding vs. Chandler, 160 U. S., 394 at 395, 403, 406 (1895);
Scranton vs. Wheeler, 179 U. S., 141 at 144 (1900);
Ryan vs. Brown, 18 Mich., 196 at 210-1 (1869);
Sherwood vs. Commissioners, 113 Mich., 227 (1897);
Scranton vs. Wheeler, 57 Fed., 803 (1893);
Kemp vs. Stradley, 134 Mich., 676 (1903).

RIVER OR STRAIT

Map of Mullett's Survey of 1845 shows on Town. 47 N., Range 1 E., "St. Mary's River." (Ex. 1, Rec. 76.)

Map Reservation, Sept. 2, 1847, shows "St. Mary's River." (Ex. 12, Rec. 139.)

Map of Designation of March 10, 1852, shows "St. Mary's River." (Ex. 15, Rec. 146.)

Map Designation August 3, 1852, shows "Saint Mary's River." (Ex. C. 20, Rec. 160.)

Whelpley's Map of his survey shows "River Ste. Marie Rapids." (Ex. 23, Rec. 163.)

Patent to Chandler bounds the grant "by the River St. Mary on the east, north and west."

In all subsequent dealings between the United States and Chandler's grantee, defendant, the stream has been called St. Mary's River.

After the United States has sold by plat, it cannot dispute the truth of the plat. (50.)

"Such plat becomes an essential part of the description itself." (51.)

NOTE 50—Bates vs. R. R., 66 U. S., 204 (1861);
Lindsey vs. Hawes, 67 U. S., 554 (1862);
R. R. vs. Schurmeir, 74 U. S., 272 (1868);
R. R. vs. R. R., 26 Minn., 31, 34 (1879).

NOTE 51—Shoefelt vs. Spaulding, 37 Wis., 662, 668 (1875).

AD HOMINEM.

Counsel charges Chandler, patentee, with being a speculator.

In answer, we call attention to a letter written by Mr. Chandler on May 19, 1883, to Major Farquhar, of the U. S. Engineering Corps at Detroit, wherein Mr. Chandler said,

"I will submit the same proposition to you that I made verbally to your predecessor, Genl. Weitzel, regarding the terms upon which the United States could secure a title, provided the appeal proceedings are decided in my favor.

1st. Should the United States wish to secure this tract of land for canal purposes, I will make deed to the same for any compensation that you and Mr. Wheeler may after investigation of all the facts concerning my location of the same, deem just and equitable.

2nd. Should the United States only desire the title to the lower end of the tract, I will deed that portion of it without compensation." (Rec. 559.)

The Mr. Wheeler referred to was E. S. Wheeler, the general superintendent of the United States canal, and engineer in charge of the Government works at Sault Ste. Marie.

March, 1908.

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Solicitor for Appellee.

MOSES HOOPER,
JOHN H. GOFF,
Of Counsel.

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